89- 1432

NO. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WAYNE P. JACKSON,

Petitioner,

vs.

JOHNSTOWN/CONSOLIDATED REALTY TRUST and TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondents.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, Fourth Division

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March 1990

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QUESTIONS PRESENTED

It is settled by decision of this Court in *Butner v. United States*, 440 U.S. 48 (1979), that state law governs rights in real property of a debtor in bankruptcy. This case presents the following questions:

1. May a state court, acting on the authority of an order of the bankruptcy court, purportedly entered under 11 U.S.C. § 105 as a matter of federal equity law, suspend or nullify the state constitution, which explicitly prohibits judicial sales of real estate by private commissioners or fee officers, and thereby sustain a judicial sale of real estate not conducted in accord with applicable state law?

2. In light of the conflict with the *Butner* decision should this Court exercise its authority under Sup. Ct. R. 16.1 (previously 23.1) to grant certiorari and simultaneously grant summary disposition on the merits and vacate, reverse and remand?

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INTRODUCTORY STATEMENT

Wayne P. Jackson petitions this Court for a writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, First District, Fourth Division.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, Fourth Division is reported at 185 Ill. App. 3d 734, 542

N.E.2d 30, 1989 Ill. App. Lexis 930, and at 134 Ill. Dec. 30 (1989), and is appended hereto as pages A.1 to A.7. The order and mandate of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal appears at pages A.8 – A.9.

JURISDICTION

The Judgment of the Appellate Court of Illinois, First District, Fourth Division was entered on June 22, 1989. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on December 5, 1989 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

QUESTIONS PRESENTED

It is settled by decision of this Court in *Butner v. United States*, 440 U.S. 48 (1979), that state law governs rights in real property of a debtor in bankruptcy. This case presents the following questions:

1. May a state court, acting on the authority of an order of the bankruptcy court, purportedly entered under 11 U.S.C. § 105 as a matter of federal equity law, suspend or nullify the state constitution, which explicitly prohibits judicial sales of real estate by private commissioners or fee officers, and thereby sustain a judicial sale of real estate not conducted in accord with applicable state law?

2. In light of the conflict with the *Butner* decision should this Court exercise its authority under Sup. Ct. R. 23.1 to grant certiorari and simultaneously grant summary disposition on the merits and vacate, reverse and remand?

LIST OF PARTIES

The parties to the proceedings in the Illinois Appellate Court were the petitioner, Wayne P. Jackson, and the respondents Johnstown/Consolidated Realty Trust and Trustees of Central States, Southeast and Southwest Areas Pension Fund. The parties before this Court are the same.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 4

> Section 8. The Congress shall have Power
> . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

IL. CONST. art. VI, § 14

> **Section 14. Judicial Salaries and Expenses—Fee Officers Eliminated**
>
> Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office. All salaries and such expenses as may be provided by law shall be paid by the State, except that Appellate, Circuit and Associate Judges shall receive such additional compensation from counties within their district or circuit as may be provided by law. There shall be no fee officers in the judicial system.

STATUTES

Effective until 30 days after October 27, 1986:

92 Stat. 2555, 11 U.S.C. § 105. Power of court:

> (a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Effective 30 days after October 27, 1986:

100 Stat. 554, 11 U.S.C. § 105. Power of court:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

STATEMENT OF THE CASE

The underlying action was a mortgage foreclosure action filed on January 3, 1986 in the Circuit Court of Cook County, Illinois, brought initially by the Trustees of Central States, Southeast and Southwest Area Pension Fund. Record in the Appellate Court of Illinois ("C") C 02-67. Thereafter, on February 5, 1986 Johnstown/Consolidated Realty Trust f/k/a Consolidated Capital Income Opportunity Trust, the other mortgagee Respondent, filed its counterclaim to foreclose its junior mortgage. (C 78 – 148.) The security for the mortgages was a multi-story commercial office building in the Chicago Loop. Petitioner, Major General Wayne P. Jackson, U.S.A.R. Ret., was not expressly named as a defendant but was legally included within the category of "unknown owners and non-record claimants," named as defendants. Title to the real estate was held in two Illinois land trusts. (C 05.) The land was owned by LaSalle National Bank as a land trustee, the building and other improvements on the land were owned by American National Bank as land trustee. (C 02.) The beneficial interest in the trust owning the building was held by 29 East Madison Associates, an Illinois Limited Partnership, of which partnership Wayne P. Jackson was the general partner.

On February 13, 1986, 29 East Madison Associates sought protection from creditors and initiated a voluntary Petition for Relief in the United States Bankruptcy Court for the Northern District of Illinois under Chapter 11. (Case No. 86 B 2240). On April 29, 1986, an order agreed to by counsel for the parties, including counsel then representing 29 East Madison Associates, was entered in the bankruptcy court. (C 467 – 484.) The order included several Exhibits (C 485 – 510) including Exhibit B, an order (C 486 – 499) to be entered in state court and providing for lifting the automatic stay as to the foreclosure action against the commercial building (A.10) and entry of an order in state court resulting in a public, judicial, auction sale of the property conducted in the bankruptcy courtroom, by "a commissioner." On June 13, 1986, the state court order authorizing the sale was entered, (C 605 – 617) (A.10) and on July 24, 1986, the sale was conducted. Both orders were drafted by counsel for Respondents. The sale produced a bid of $10,400,000.00, by Respondent Johnstown/Consolidated. (C 806 – 807.) The trial court received a "Commissioner's Report of Sale and Distribution," (C 829 – 832) which revealed a "Commissioner's Fee" of $3,058.00 paid to the Commissioner. (C 831.) The trial court confirmed the results of the sale on September 3, 1986, over objections by defendants other than Petitioner, on bases other than those raised herein by Petitioner. On September 17, 1986 the Verified Second Report of Mortgagee in Possession Consolidated Capital Income Opportunity Trust, was filed (C 990 – 1001.)

Thereafter, Wayne P. Jackson filed a timely petition under Ill. Rev. Stat. Ch. 110, § 2-1401 on December 16, 1986, (C 1006) to void the commissioner's sale and he amended the petition on January 15, 1987. (C 1125 – 1131.) The amended petition first raised the question of the absence of authority

on the part of the state court to appoint a commissioner to conduct a foreclosure sale. On March 31, 1987 the trial court denied Jackson's Amended Petition to void a portion of the Foreclosure Decree. (C 1262.)

HOW THE FEDERAL QUESTION WAS PRESENTED

The Federal question was first presented by Respondents in their brief in the Illinois Appellate Court. The Illinois Appellate Court entertained and decided the Federal question.

Prior to that point in the case Petitioner had focused on the clearly void nature of the sale under state property law. He presented his contentions to the trial judge in his amended § 2-1401 petition (C 1125 – 1131.) The Amended Petition set forth that the Illinois Constitution had been violated by the manner in which the sale had been conducted. The trial court denied the Amended Petition. (C 1262.)

In the Illinois Appellate Court Petitioner again presented his claim that the sale had been conducted in violation of the Illinois Constitution. At this point in the case, after Respondents had seen Petitioner's arguments and authorities, Respondents first argued that the Illinois constitutional question was not dispositive, but rather that the preemptive authority of the Federal Bankruptcy Court was dispositive. Accordingly, the Defendants, in their brief, added what they stated to be a preemptive federal issue. The Respondents argued that state law made no difference, that the entire issue was resolved by federal law. (A.11 – A.12.)

Specifically, Respondents asserted that the Bankruptcy Order entered by Bankruptcy Judge Eisen meant that "Regardless of the propriety of a sale by a commissioner under Illinois law, the Agreed Bankruptcy Order supersedes any applicable state law and therefore validates the appointment

of a commissioner." The Respondents went on to argue: "Federal bankruptcy law clearly supersedes state law."

The court's ruling embracing the federal issue stated that the order entered in Federal bankruptcy court superseded the applicable state law regardless of any alleged impropriety of the sale by an appointed commissioner. (A.5.)

The federal question was set forth in the Petition for Leave to Appeal filed with the Illinois Supreme Court which stated:

> The State of Illinois Constitution of 1970 provides, in part, at Article VI, § 14 that: "There shall be no fee officers in the judicial system." The petitioner collaterally attacked, as void, a portion of the trial court's judgment of foreclosure and sale which provided for the sale to be conducted by a commissioner appointed by the trial court. The Appellate Court did not void that portion of the judgement [sic] order, based on:
>
> (a) A state court referencing a chancery matter to a special commissioner is, at most, voidable.
>
> (b) The agreed bankruptcy order supervisionally reviewed by the Federal Bankruptcy Court validates the appointment of a commissioner, even if prohibited by the Illinois Constitution.
>
> (c) A Federal Bankruptcy Court may order a state court to enter a judgment containing a Constitutionally prohibited appointment in order to enforce the provisions [sic] of the bankruptcy court.
>
> (d) An agreed bankruptcy order supersedes applicable state law irrespective of the impropriety of a state court appointing a fee officer.

That Petition was denied by the Illinois Supreme Court on December 5, 1989. (A.8 – A.9.) Thus, the Illinois Court of Appeals, First District, Fourth Division, is the "highest court of [the] State in which a decision could be had." 28 U.S.C. § 1257(a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Contrary to *Butner v. United States*

The relationship between state property law and the federal bankruptcy power has produced substantial litigation and commentary.[1] This Court settled the basic principles in this area in *Butner v. United States,* 440 U.S. 48 (1979). The Bankruptcy Act leaves the determination of property rights to state law. Accordingly, this case falls squarely within the scope of Sup. Ct. R. 17.1(c), a state court has decided a federal question in a way in conflict with applicable decisions of this Court.

In *Butner v. United States, supra,* the Court was faced with the question of whether the right to rents between the date of the mortgagor's bankruptcy and the foreclosure sale of the mortgaged property was determined by a federal rule of equity or by the law of the state where the property was located. The Court granted certiorari not to resolve issues of North Carolina law, but rather to resolve a conflict between Circuits. (440 U.S., at 51-52.) So too, in the instant case Petitioner does not seek resolution by this Court of the contested issues of Illinois law, but rather that this Court resolve the conflict between the Appellate Court's ruling and *Butner.*

This Court ruled :

> . . . Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. [footnote omitted]

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[1]Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren,* 54 U. Chi. L. Rev. 815 (1987); Baird & Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: a Comment on Adequate Protection of Secured Creditors in Bankruptcy,* 51 U. Chi. L. Rev. 97 (1984); Jackson, *Bankruptcy, Non-Bankruptcy, Entitlements and the Creditors' Bargin,* 91 Yale L.J. 857 (1982)

> . . . Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'

Butner v. United States, 440 U.S. 48 (1979), at 54-55.

In holding that state law must apply this Court said:

> The rule of the Third and Seventh Circuits, at least in some circumstances, affords the mortgagee rights that are not his as a matter of state law. The rule we adopt avoids this inequity because it looks to state law to define the security interest of the mortgagee.

Butner v. United States, 440 U.S. 48 (1979), at 56.

The Court affirmed the position of the Second, Fourth, Sixth, Eighth and Ninth Circuits, and declined to review the state law questions which the parties had briefed. (id. 58.)

In *Stellwagen v. Clum,* 245 U.S. 605 (1918), the underpinnings of the *Butner* decision are found. In *Stellwagen,* the Court was confronted with the claim that certain Ohio statutes relating to the validity of transactions made in contemplation of insolvency, were suspended by the Bankruptcy Act. (245 U. S. at 610.) The Court sustained the continued effectiveness of the Ohio statutes. The Court rejected the contention that bankruptcy law would sustain transactions " . . . voidable under the laws of the State where . . . made . . . " (245 U.S. at 617.) *Butner* is of continuing vitality, having been cited over 100 times. Circuit courts have affirmed its applicability under the new bankruptcy code. *Justice v. Valley Nat. Bank,* 849 F.2d 1078, 1084, 1087, 1088 (8th Cir. 1988); *Saline State Bank v. Mahloch,* 834 F.2d 690

(8th Cir. 1987) in which the court held: "After *Butner v. United States*, . . . the rights of a secured creditor must be determined according to the applicable non-bankruptcy law of the state wherein the debt arises." (834 F.2d at 692.)

However, in the instant case, the Illinois Appellate Court ruled squarely against the *Butner* holding, stating:

> We, therefore, find that the appointment of the commissioner pursuant to the agreed bankruptcy order entered by the Federal bankruptcy court was valid even if the Illinois Constitution were to be construed so as to prohibit the appointment of the commissioner in these circumstances. (A.6.)

Proceeding further in the wrong direction, the Illinois Appellate Court, (A.5) cites 11 U.S.C.A. § 105(a) (West Supp. 1989) as authority for its decision sustaining the June 13, 1986 state court order appointing the commissioner. (A.10.) Which order in turn found its genesis as an attachment to the Bankruptcy Court order of April 28, 1986. (A.10.) However, the language from 11 U.S.C.A § 105(a) quoted by the Illinois Appellate Court was for the most part not in existence at the time the order in question was entered. Most of the language quoted by the Illinois Appellate Court was enacted by Congress effective 30 days after October 27, 1986.[2] Furthermore, as required by *In re Casgul of Nevada, Inc.*, 22 B.R. 65, (B.A.P. 9th Nev. 1982), an order relying on § 105 should relate how it was necessary or appropriate to carry out § 105's purpose. 22 B.R. at 67. Since the purpose in the instant case was in fact the conduct of the *state* foreclosure sale, § 105 affords no authority for overriding the *state* constitution.

Finally the Illinois Appellate Court turned to *Brown v. Buchanan*. 419 F. Supp. 199 (E. D. Va. 1975), a pre-*Butner*

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[2]West U.S.C.A. 1989 Supplementary Pamphlet pp. 40-41, note "Effective Date of 1986 Amendments."

case, as the definitive authority that Article I, § 8 of the United States Constitution and "any" bankruptcy laws suspend any state law in conflict with them. While it is evident that the Constitution has placed the bankruptcy power in the federal government, all that the *Brown* court was faced with—and in fact decided—was the issue of whether federal law or state law should set the burden of proof in a federal bankruptcy proceeding as to non-dischargeability of a debt due to debtor's fraud. No question of a court order overriding a state Constitution was presented.

2. The State Law Issues in the Opinion Below Do Not Mitigate Against the Grant of Certiorari and Summary Reversal.

The need to correct the affront to the *Butner* ruling is sufficient reason alone to grant Petitioner the relief sought. However, there is further rationale for not concluding that state issues in the opinion preclude relief.

First, a careful reading of the opinion below indicates that the federal question basis of the ruling was critical. The primary state law issue, in the words of the court, was whether or not the sale had been conducted in violation of the Illinois Constitution. (A.2.) The Appellate Court, while trying to be discrete and obscure about it, decided that question in Petitioner's favor, based on the language of the Illinois Constitution and the court's earlier holding in *Factor v. Factor*, 27 Ill. App. 3d 594, 327 N.E.2d 396 (1st Dist. 1975). In the opinion below, the court stated: (A.4.): "The *Factor* court held that article VI, section 14 of the 1970 Illinois Constitution prohibits the appointment of a commissioner for purposes of selling real estate." However, the court below, evidently reluctant to award victory to a debtor-mortgagor, declined to proceed to grant the relief which the *Factor* court had granted. The *Factor* court, in disallowing a sale by a commissioner, held:

> Plaintiff contends that the court has broad discretion in approving judicial sales. . . . However, this statement

> applies to the broad discretion held by courts in connection with the approval of judicial sales. *Under no circumstances can the application of this principle justify a violation of clear constitutional and statutory provisions.* It follows that the order of August 22, 1974 was improvidently entered. It is reversed and cause remanded for further proceedings not inconsistent with this opinion. [Emphasis added]

Factor, 327 N.E.2d, at 399.

Similarly, Illinois Courts have held that a judicial sale is void when the basis for the defect (i.e. in the instant case a sale in violation of the explicit language of the Illinois Constitution) appears on the face of the record. *City of Chicago v. Cosmopolitan National Bank*, 120 Ill. App. 3d 364, 458 N.E.2d 11 (1st Dist. 1983).

Left with the dilemma of having to rule for Petitioner on the sole issue which the court said was before it, the court embraced federal preemption as an anchor for its ruling. The aspects of the opinion regarding collateral attack, and purported failure to meet the standards of Ill. Rev. Stat. Ch. 110 § 2-1401 to vacate a judgment should be reconsidered by the Illinois Appellate Court in light of a correct understanding of federal law. In light of *Butner*, reliance by the court on the federal question taken with the explicit language of *Factor*, renders the state law arguments not adequate and independant bases for the ruling. The mere recitation of several areas of law is insufficient basis to defeat certiorari.[3] Just as in *Butner*, (440 U.S., at 58), this

[3]In *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1979), the state court in its opinion posited four separate bases for its damages award, 62 Ill. App. 3d 653, 378 N.E.2d 1232, 1245-1247 (1st Dist. 1978.) Respondents opposed certiorari in that case on the basis of failure to establish a substantial federal question. (Brief in Opposition to Petitioner's Application for a Writ of Certiorari at pp. 2, 7-10) but this Court in that case identified the federal issue as appropriate for resolution and granted certiorari.

Court need not pass on the state law issues, but should nevertheless act to correct the conflict with its decision.

The court below also suggested that it could not rule for Petitioner because Petitioner had "consented" to the order[4] (A.6.); had argued other issues first and had delayed seeking relief.[5] Arguing other issues hardly justifies a ruling contrary to *Butner*.

Finally (A.6 – A.7.) the court stated that Petitioner had shown no prejudice from potential purchasers participating in a sale which could later be declared void. However, this Court rejected a similar argument in *Stellwagen v. Clum*, 245 U.S. 605 (1918): "Congress did not intend to permit a conveyance such as here involved to stand which creditors might attack and avoid under the state law." (245 U.S., at 618.)

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[4]It is black letter state and federal law that erroneous stipulations of law may be set aside. This Court has held that it cannot be controlled by agreement of counsel on a subsidiary question of law. Nor will the fact that a stipulation was given effect by the state courts bind this Court. *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917). In *Brink v. Industrial Com.*, 368 Ill. 607, 15 N.E.2d 491, 492 (1938), the Illinois Supreme Court sustained an order setting aside an erroneous stipulation that the Workman's Compensation Act, and not FELA, governed an injured workman's claim. See also *People of the State of Illinois v. Polk*, 115 Ill. App. 3d 1011, 451 N.E.2d 579, 580 (3rd Dist. 1983), setting aside an erroneous stipulation of law in response to a seasonably made motion. The *Polk* court noted that an agreed-to order is not literally a stipulation, but held that there was no meaningful distinction. (id. 580.) Also supporting the proposition that erroneous stipulations of law are not binding are: *Equitable Life Assur. Soc. v. MacGill*, 551 F.2d 978 (5th Cir. 1977); *First Nat. Bank & Trust Co. v. Jones*, 61 F. Supp. 364 (W.D. Okla. 1945); The failure to seek relief promptly is not determinative *Logan Lumber v. Comm. of Int. Rev.*, 365 F.2d 846 (5th Cir. 1966).

[5]A void judgment may be attacked at any time. *Reynolds v. Burns*, 20 Ill. 2d 179, 192, 170 N.E.2d 122 (1960); *In re Petition of Stern*, 2 Ill. App. 2d 311, 120 N.E.2d 62 (1st Dist. 1954); *City of Chicago v. Fair Employment Practices Com.*, 65 Ill. 2d 108, 357 N.E.2d 1154 (1976).

While the necessity of reversing the opinion because of the conflict with *Butner* is dispositive, the manner in which the state law and federal law issues were discussed in this case does not preclude granting certiorari. In *United Airlines v. Mahin,* 410 U.S. 623 (1973), this Court held: "The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." (410 U.S. at 630-631).[6] The state court's interpretation of state law has been influenced by the erroneously broad interpretation of federal law in the instant case.

3. Appropriate Relief Can Be Provided by Granting Certiorari, Vacating and Remanding.

Because the opinion below is so strikingly wrong on the federal issue this Court can do justice by granting certiorari

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[6]In *Three Affiliated Tribes v. Wold Engineering, P.C.,* 467 U.S. 138, 152 (1984), This Court amplified that concept.

> It is equally well established, however, that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. In some instances, a state court may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements. See, *e.g., United Airlines, Inc., v. Mahin,* 410 U.S. 623, 630-632 (1973); *State Tax Comm'n v. Van Cott,* 306 U.S. 511, 513-515 (1939); *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 120 (1924); see also *San Diego Building Trades Council v. Garmon,* 353 U.S. 26 (1957). In others, in contrast, the state court may construe state law broadly in the belief that federal law poses no barrier to the exercise of state authority. See, *e.g., Standard Oil Co. v. Johnson,* 316 U.S. 481 (1942). In both categories of cases, this Court has reviewed the federal question on which the state-law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.

and entering summary reversal under Sup. Ct. R. 23.1 on the federal question, vacation of the judgment and a remand to the Illinois Appellate Court with instructions to rehear the case in light of proper resolution of the federal question. The *Butner* case is controlling, the Petitioner's state law property rights must be resolved by application of state property law without misapprehension and misunderstanding of federal preemption. This Court has embraced such summary relief in appropriate cases. *Mason v. City of Biloxi*, 385 U.S. 370 (1966); *Rogers v. Calumet Nat. Bank of Hammond*, 358 U.S. 331 (1959). Stern, Gressman and Shapiro, Supreme Court Practice § 5.12 p. 277 (6th Ed. 1986) has summarized the law in the area of summary disposition on the merits well:

> This kind of reversal order usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time.

4. The Questions Are Important.

A. *Butner* is ignored.

This Court has clarified the relationship between federal bankruptcy law and state property law on several occasions. *Butner v. United States, supra, Stellwagen v. Clum, supra.* To be blunt, what is the point of this Court clarifying the bankruptcy/state property law relationship if the clarification is to be ignored? This case is so clear that a Sup. Ct. R. 23.1 summary reversal is called for and is appropriate.

Secondly, Illinois is a major commercial state. The opinion below will inevitably tend to introduce disorder where

Butner left clarity.[7] In this era of Lexis and Westlaw, the careless and incorrect holding of the Appellate Court "will out."

[7]Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren,* 54 U. Chi. L. Rev. 815 (1987), expresses the importance of *Butner* thusly (p. 818 fn. 3):

> The importance Jackson and I have always attached to the problem is evident in our choice of *Butner v. United States,* 440 U.S. 48 (1979), at the start of our casebook on bankruptcy. *Butner* arose under the 1898 Bankruptcy Act and dealt with an obscure feature of North Carolina real property law. Notwithstanding its lack of substantive relevance, we have always taught the case first in our bankruptcy course because *Butner* recognizes explicitly that departing from nonbankruptcy rules in bankruptcy introduces the problem of forum shopping and holds that bankruptcy rules should depart from nonbankruptcy rules only if some specific *bankruptcy* policy justifies it.

CONCLUSION

Because of the inconsistency of the decision below with *Butner v. United States, supra,* the petition for a writ of certiorari should be granted and summary reversal pursuant to Sup. Ct. R. 23.1 should be granted.

Respectfully submitted,

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March, 1990

APPENDICES

OPINION OF THE ILLINOIS APPELLATE COURT

FOURTH DIVISION
FILED: 6/22/89.

No. 1-87-1339

TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Plaintiff,

v.

LASALLE NATIONAL BANK, as Trustee Under Trust Agreement Dated 12/18/75 and known as Trust No. 21599, *et al.*,

Defendants.

WAYNE JACKSON,

Petitioner-Appellant,

v.

TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and JOHNSTOWN/CONSOLIDATED REALTY TRUST f/k/a CONSOLIDATED CAPITAL INCOME OPPORTUNITY TRUST,

Respondents-Appellees.

APPEAL from the Circuit Court of Cook County Honorable THOMAS J. O'BRIEN, *Presiding.*

JUSTICE JOHNSON delivered the opinion of the court: Petitioner, Wayne Jackson, appeals from an order of the circuit court of Cook County denying his petition to void the sale of commercial property located in Chicago, Illinois. The sole issue presented for review is whether the trial court erred in failing to find that it lacked statutory jurisdiction to appoint a commissioner to conduct a sale of real estate subject to a mortgage foreclosure judgment.

We affirm.

Petitioner is the sole general partner of an Illinois limited partnership that held 100% of the beneficial interest in American Land Trust. American Land Trust held legal title to the commercial office building that was the subject of the action in foreclosure. The property was encumbered by three mortgage liens as of January 3, 1986. The first mortgage was held by respondent Trustees of Central States, Southeast and Southwest Areas Pension Fund. Lincoln National Pension Insurance Company held the second mortgage. The third mortgage was held by Johnstown/Consolidated Realty Trust also a respondent. These mortgages secured a principal amount of debt in excess of $12 million.

Petitioner's partnership defaulted on the mortgage payments and respondents and Lincoln filed to foreclose their mortgage lien on the property. Petitioner's partnership then filed a Chapter 11 voluntary bankruptcy on February 13, 1986. On April 28, 1986, an agreed bankruptcy order was entered which set the terms of an agreed order of foreclosure for the judicial sale of the property. Petitioner's partnership was given a grace period in which to find a third party purchaser for the property. The partnership failed to find a purchaser within the specified period of time.

On June 13, 1986, the agreed order for judgment of foreclosure was entered. This order and the agreed bankruptcy order called for the judicial sale of the property on July 7,

1986. A commissioner was appointed by the trial court to take bids on the property in the bankruptcy court. This allowed the bankruptcy judge to observe the sale. The sale took place on July 24, 1986. Johnstown/Consolidated Realty Trust was the only bidder at $10.4 million. On August 15, 1986, respondents and Lincoln jointly moved to confirm the sale. The sale was confirmed on September 3, 1986.

Petitioner then filed a petition to set aside the order confirming sale and to void the commissioner's sale on December 16, 1986, more than 3 months after the sale had been confirmed. Petitioner argued that the sale was void because although the agreed foreclosure order was entered in circuit court, the sale was held on Federal property in a bankruptcy courtroom. On January 15, 1987, after the property was sold to a third party purchaser, petitioner filed an amendment to set aside the order confirming sale, to void the commissioner's sale, and to void a portion of the judgment foreclosure.

On March 3, 1987, the amended petition was denied. The court found that its order of June 13, 1986, was not void, and that there were no grounds to vacate since the June 13 order was entered with petitioner's consent, and no motion to vacate was filed until 6 months after its entry. This appeal followed.

Petitioner contends that the court order confirming the sale of the real estate is void and, therefore, subject to collateral attack. "Any petition to vacate an order, judgment or decree filed more than 30 days after entry thereof, even though made to the court that rendered it, constitutes collateral attack." (*People v. O'Keefe* (1960), 18 Ill. 2d 386, 391.) In the case of collateral attack all presumptions are in favor of the validity of the attacked judgment, and the face of the record. (*Schaller v. Trustees of Schools* (1978), 67 Ill. App. 3d 857, 866.) In the area of judicial sales, collateral attacks

are limited to sales which are void because of a lack of jurisdiction of the court over the subject matter or person or due to fraud in procuring the sale. *City of Chicago v. Central National Bank* (1985), 134 Ill. App. 3d 22, 26.

In the instant case there are no allegations of fraud in the sale proceedings nor is there a claim that the court lacked subject matter or personal jurisdiction over the sale. Petitioner maintains that the trial lacked statutory jurisdiction to appoint a commissioner to conduct the sale pursuant to article VI, section 14 of the 1970 Illinois Constitution. Section 14 provides, in pertinent part, that "[t]here shall be no fee officers in the judicial system." Ill. Ann. Stat., 1970 Const., art. VI, §14.

Petitioner cites *Factor v. Factor* (1975), 27 Ill. App. 3d 594 to support his proposition that it is jurisdictional error for the court to appoint a commissioner to conduct the sale in question. (*Factor,* 27 Ill. App. 3d at 597.) *Factor* was a post-dissolution of marriage proceeding which involved the direct appeal of a contested court order directing a commissioner to conduct the private judicial sale of marital property. The *Factor* court held that article VI, section 14 of the 1970 Illinois Constitution prohibits the appointment of a commissioner for the purpose of selling real estate. *Factor,* 27 Ill. App. 3d at 597.

Petitioner asserts, pursuant to *Factor,* that the sale was void because the trial court lacked statutory authority to appoint a commissioner. However, even if the trial court lacked statutory authority to appoint a commissioner, the error would not be jurisdictional. The error would result in a voidable judgment and would not, therefore, be the proper subject of a collateral attack. *Stark v. Stark* (1955), 7 Ill. App. 2d 442, 444; *Phillips v. O'Connell* (1947), 331 Ill. App. 511, 528-29.

The case at bar is analogous to the situation in *Phillips v. O'Connell* (1947), 311 Ill. App. 511. In *Phillips*, a belated objection was made to the appointment of a special commissioner on the grounds that the trial court lacked statutory authority to refer chancery matters to a special commissioner. The appellate court held that the trial court properly had jurisdiction of the subject matter and the parties and that the improper reference resulted in a proceeding that was voidable at most. We, therefore, find that the trial court did not err in finding that the appointment of a commissioner to take bids at the sale in question did not result in a void proceeding.

Further, the case at bar also involves the jurisdiction of the Federal bankruptcy court. The agreed bankruptcy order entered in Federal bankruptcy court provided for the appointment of a commissioner to conduct the sale by requiring entry of the agreed foreclosure order which provided for the appointment of a commissioner. Respondents are correct in their assertion that the agreed bankruptcy order supersedes the applicable state law regardless of any alleged impropriety of the sale by an appointed commissioner.

"The [bankruptcy] court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C.A. §105(a) (West Supp. 1989).

"Article I, section 8 of the United States Constitution provides that the Congress shall have power to establish uniform bankruptcy laws throughout the Nation. Any such

laws promulgated by the Congress operate to suspend any state law in conflict with them. [Citations.]" (*Brown v. Buchanan* (E.D. Va. 1975), 419 F. Supp. 199, 201.) We, therefore, find that the appointment of the commissioner pursuant to the agreed bankruptcy order entered by the Federal bankruptcy court was valid even if the Illinois Constitution were to be construed so as to prohibit the appointment of the commissioner in these circumstances.

Finally, we will address vacation of the order confirming the sale pursuant to section 2-1401 of the Code of Civil Procedure. (Ill. Rev. Stat. 1985, ch. 110, par. 2-1401.) The trial court, after finding that the order of June 13, 1986, was not void, also concluded that petitioner did not meet the requirements of section 2-1401 to have the order vacated on equitable grounds. A 2-1401 petition invokes the court's equitable power to vacate a judgment attended by unfair, unjust or unconscionable circumstances and it is incumbent on the petitioner to show that his meritorious defense was diligently brought to the court's attention. *City of Chicago v. Central National Bank* (1985), 134 Ill. App. 3d 22, 25.

We are in agreement with the trial court that petitioner failed to diligently protect his alleged rights. Since the order was entered with petitioner's consent, the motion to vacate was not raised until 6 months after its entry, and petitioner objected to confirmation of the sale on other grounds, we find that the trial court did not err in denying petitioner's petition to set aside the order confirming the sale and voiding the commissioner's appointment.

Petitioner also alleges that the commissioner's taking of the bids in the foreclosure sale prejudiced him because it dissuaded potential purchasers from participating in a sale which would later be declared void. This argument, however, assumed that petitioner's posture is legally correct. We find,

to the contrary, that petitioner's argument is without merit and, therefore, petitioner was not prejudiced by the appointment of the commissioner.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

LINN and MCMORROW, JJ., concur.

ORDER AND MANDATE OF THE ILLINOIS SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of November, 1989.

Present: THOMAS J.MORAN, *Chief Justice*

Justice DANIEL P. WARD
Justice WILLIAM G. CLARK
Justice JOHN J. STAMOS
Justice HOWARD C. RYAN
Justice BEN MILLER
Justice HORACE L. CALVO

On the fifth day of December, 1989, the Supreme Court entered the following judgment:

No. 69186

WAYNE JACKSON,
Petitioner

v.

TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and JOHNSTOWN/CONSOLIDATED REALTY TRUST f/k/a CONSOLIDATED CAPITAL INCOME OPPORTUNITY TRUST,
Respondents

Petition for Leave to Appeal from Appellate Court First District
1-87-1339
86CH73

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-seventh day of December, 1989.

JULEANN HORNYAK
Clerk,
Supreme Court of the State of Illinois

EXCERPTS FROM THE RECORD

Excerpt From the Bankruptcy Court Order of April 29, 1986 (C 475):

* * *

2. The automatic stay is hereby modified to permit the Secured Creditors to foreclose their Security Documents in the Foreclosure Action. The Debtor is authorized and directed to execute the Joint Decree of Foreclosure and Sale of the Premises in substantially the form attached hereto as *Exhibit B*, which provides for the foreclosure sale of the Premises, for cash (subject to the liens of real estate taxes if applicable) at 10:00 a.m. on July 7, 1986 ("Sale Date") . . .

* * *

Excerpts from the State Court Order of June 13, 1986 (C 613-616):

* * *

5. This Court hereby appoints Bruce J. Waldman to be the Commissioner ("Commissioner") to sell the Property and to perform the other services otherwise to be performed by the Sheriff, and the Commissioner shall receive reasonable compensation for his disbursements and for his services from the proceeds of sale of the Property . . . taking into account his customary rates for such services.

* * *

[T]he Property . . . shall be sold at public sale, to the highest bidder for cash, by the Commissioner at 10:00 a.m. local Chicago time on July 7, 1986 . . . in the Courtroom occupied by the Honorable Robert L. Eisen, 16th floor, Dirksen Federal Building. . .

* * *

7. [T]he Commissioner . . . shall execute and deliver to the purchaser . . . a good and sufficient deed of conveyance of the Property.

* * *

8. The Commissioner . . . shall make distribution in the following order of priority:

   (a) to the Commissioner for his fees, disbursements, and commission on such sale . . .

Excerpt from the *"Joint Brief of Appellees Johnstown/Consolidated Realty Trust and Trustee of Central States Southeast and Southwest Area Pension Fund,"* filed in the Appellate Court of Illinois, pp. 28–30.

IV. The Order Of A Federal Bankruptcy Court Validly Appointed A Commissioner To Conduct The Sale.

The Agreed Bankruptcy Order entered by Chief Bankruptcy Judge Eisen provided for the appointment of a commissioner to conduct sale, by requiring entry of the Agreed Foreclosure decree which provided for the appointment of a commissioner. Regardless of the propriety of a sale by a commissioner under Illinois law, the Agreed Bankruptcy Order supersedes any applicable state law and therefore validates the appointment of a commissioner.

Federal bankruptcy law clearly supersedes state law. As stated in *Brown v. Buchanan (In re Brown),* 419 F.Supp. 199, 201 (E.D. Va. 1975):

> "Article I, section 8 of the United States Constitution provides that the Congress shall have power to establish uniform bankruptcy laws throughout the Nation. *Any such laws promulgated by the Congress operate to suspend any state law in conflict with them. Stellwagen v. Clum,* 245 U.S. 605, 38 S.Ct. 215, 62 L.Ed 507 (1918) [further citations omitted; emphasis added].

The authority by which Chief Bankruptcy Judge Eisen entered the Agreed Bankruptcy Order is contained in section 105(a) of the Bankruptcy Code, 11 U.S.C. §105(a), which is denominated "Power of court." This section provides, in relevant part, that "The [bankruptcy] court may issue *any* order, process or judgment that is necessary or appropriate to

carry out the provisions of this title . . .".[4] 11 U.S.C. § 305(a) (emphasis added). The Agreed Bankruptcy Order advanced the paramount bankruptcy purposes of adjudicating lien validity (11 U.S.C. §506), administering an asset by sale (11 U.S.C. §363) or by foreclosure (11 U.S.C. §362), resolving a controversy to appoint an examiner and modify stay (Bankruptcy Rule 9019), and providing payment to creditors. To the extent, if any, that these federal bankruptcy purposes were achieved by a procedure which contravened state law, then such contrary state law is simply overridden. Irrespective of state law, the appointment of a commissioner to conduct the instant foreclosure sale was valid because it was required by an order of the bankruptcy court. Thus, Jackson's appeal must be denied.

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[4] Although the order was agreed, its entry by Judge Eisen is an independent imprimatur of its contents by the bankruptcy court. *Cf. Anderson v. Bessamer,* 470 U.S. 564, 572 (1985) where the Supreme Court held that even where findings of fact presented by a prevailing party are adopted verbatim by the court, the findings are those of the court.

No. 89-1432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WAYNE P. JACKSON,

Petitioner,

v.

JOHNSTOWN/CONSOLIDATED REALTY TRUST and TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondents.

BRIEF OF RESPONDENT TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Trustees of Central States, Southeast and Southwest Areas Pension Fund

April 1990

QUESTIONS PRESENTED

1. Did the Illinois Appellate Court have adequate and independent state law grounds for its conclusion that a foreclosure sale conducted by a court appointed commissioner, rather than by a sheriff, is not void?

2. May Petitioner seek review of a judgment prescribing that a foreclosure sale be conducted by a court appointed commissioner rather than by a sheriff, where Petitioner has consented to that judgment and it has caused him no injury?

3. May a bankruptcy court, acting pursuant to 11 U.S.C. § 105, enter an order, agreed to by the debtor, which directs the debtor and its creditors to submit to a state court an order of foreclosure on debtor's property which prescribes that a commissioner, rather than a sheriff, shall conduct the foreclosure sale?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are correctly identified in the Petition For A Writ Of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, a list of those parties is omitted here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

The opinion below is correctly cited in the Petition For A Writ Of Certiorari. In accordance with Rule 24.2 of the Rules Of The Supreme Court, the citation for that opinion is omitted here.

JURISDICTION

Petitioner purports to invoke the jurisdiction of this Court under 28 U.S.C. §1257(a). As set forth in the argument section of this brief, this Court in fact lacks jurisdiction over this case because, without limitation, the decision below was based on adequate and independent state grounds and because Petitioner has suffered no injury and consequently lacks standing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Constitutional provisions cited by Petitioner, this case also involves the supremacy clause of the United States Constitution, Art. VI, cl. 2, which provides in relevant part, ". . . the Laws of the United States . . . shall be the supreme Law of the Land; . . .".

In addition to the Illinois constitutional and statutory provisions cited by Petitioner, the case also involves the following Illinois statutes. The first is Ill. Rev. Stat., ch. 110, ¶15-1506(f)(3) which provides, in relevant part, that a party may request a foreclosure judgment to name "an official or other person who shall be an officer to conduct the sale . . ." The second is Ill. Rev. Stat., ch. 110, ¶15-1506(f)(6) which provides, in relevant part, that a judgment of foreclosure may authorize "fees to be paid out of the [foreclosure sale] proceeds to an auctioneer. . .".

No. 89-1432

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JOHNSTOWN/CONSOLIDATED REALTY TRUST and TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondents.

BRIEF OF RESPONDENT TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

It is necessary to amplify Petitioner Jackson's Statement of the Case as follows:

A. The Property and Petitioner's Interest

The real estate involved in this case is a commercial office building, commonly known as the Heyworth Building, located at 29 East Madison Street in Chicago (the "Property"). (CO5).[1] Prior to foreclosure, legal title to the

[1] References are to the record in the Illinois Appellate Court.

Property was held in two Illinois land trusts.[2] The land was owned by LaSalle National Bank as land trustee (the "LaSalle Land Trust"). (CO3-05). The building and other improvements on the land were owned by American National Bank and Trust Company of Chicago as land trustee (the "American Land Trust"). (*Id.*).

Prior to foreclosure, 29 East Madison Associates, an Illinois limited partnership (the "Jackson Partnership"), held 100% of the beneficial interest and power of direction in the American Land Trust. (C373A; C374-379; C606). Petitioner Wayne P. Jackson is the sole general partner of the Jackson Partnership. (Petition, at 4). Both the American Land Trust and the Jackson Partnership were, of course, parties to the Foreclosure and Bankruptcy cases, which are discussed presently.

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[2] Professor Henry Kenoe states, "... the distinctive features of the [Illinois] land trust may be summarized as follows:

> 1. Both legal and equitable title [to the land] are vested in the trustee, and the beneficiary has no interest in either. ...
>
> 2. The trustee has no duties or powers other than to convey, mortgage or deal with the real estate as directed by the beneficiaries or to sell or liquidate the property at the termination of the trust. ...
>
> 3. The rights of possession, management, control and operation of the property, as well as the right to rents, issues, profits and proceeds of sale or mortgage financing are vested in the beneficiary. ...
>
> 4. The rights, privileges and obligations of the beneficiaries are not interests in real estate but are expressly characterized as personal property."

Kenoe On Land Trusts, sec. 1.3, p. 1-5 (Ill. Inst. For CLE, 1989) [citations omitted].

B. The Foreclosure Case

As of January 3, 1986, there were three mortgage liens on the Property. Respondent Trustees Of The Central States, Southeast And Southwest Areas Pension Fund (the "Fund") held the first mortgage. (CO3-04; CO9-30). Lincoln National Pension Insurance Company ("Lincoln") held the second mortgage. (CO3). Respondent Johnstown/Consolidated Realty Trust ("JCRT") held a third mortgage. (C90-111). These three mortgages secured more than $12 million in debt. (C610). On January 3, 1986, the Fund filed a complaint to foreclose its mortgage in the Circuit Court of Cook County Chancery Division (the "Illinois Trial Court"), *Trustees Of Central States Southeast and Southwest Areas Pension Fund v. LaSalle National Bank and Trust Company As Trustee, et al.*, Case No. 86 CH 0003 (the "Foreclosure Case").

C. The Bankruptcy Case

On February 13, 1986, the Jackson Partnership filed a voluntary debtor's petition under Chapter 11, Title 11, United States Code, *In Re 29 E. Madison Associates*, Case No. 86 B 2240 (the "Bankruptcy Case"), in The United States Bankruptcy Court For The Northern District of Illinois (the "Bankruptcy Court"). Promptly thereafter, the Fund, JCRT and Lincoln moved pursuant to 11 U.S.C. §362(d) to have the automatic stay modified so that the Foreclosure Case could proceed. On April 28, 1986, these efforts resulted in the entry of an Agreed Order Modifying the Automatic Stay (the "Agreed Bankruptcy Order"). (Copy Found at C444-452). The Agreed Bankruptcy Order was consented to by the Fund, by JCRT, by Lincoln, by James F. Graves ("Graves") (the sole limited partner of the Jackson Partnership), and by the Jackson Partnership itself. (C484).

Among other things, the Agreed Bankruptcy Order set forth the terms of an Agreed Order Of Foreclosure for the judicial sale of the Property. The Agreed Bankruptcy Order required the parties, including the Jackson Partnership, to submit the Agreed Order Of Foreclosure to the Illinois Trial Court if the Jackson Partnership and Graves failed to procure a third party purchaser within sixty days. (C475-477). Ultimately, the Jackson Partnership and Graves did not satisfy the deadline and could not persuade Bankruptcy Judge Eisen to extend it. (C722-808).

D. Entry of the Agreed Foreclosure Judgment

On June 13, 1986, the Illinois Trial Court entered an Agreed Order for Judgment of Foreclosure and Sale and Default Judgment (C605-617) ("Agreed Foreclosure Judgment"). At the same time, the Jackson Partnership stipulated to the entry of the Agreed Foreclosure Judgment, agreeing to be added as a named party to the foreclosure proceedings, and waived its answer to the Fund's and JCRT's complaints. (C429-430). The Jackson Partnership also filed an appearance in the foreclosure case. (C414). The Agreed Foreclosure Judgment was substantially the same as that called for in the Agreed Bankruptcy Order. (C605-617).

E. The Sale Procedure

The Agreed Bankruptcy Order and the Agreed Foreclosure Judgment required a judicial sale of the Property on July 7, 1986. (C614). In accordance with those orders, a commissioner was appointed by the Illinois Trial Court to take bids on the Property in the courtroom of Bankruptcy Judge Eisen in the Dirksen Building in Chicago. (C614).

F. The Judicial Sale

Pursuant to the Agreed Foreclosure Judgment, the commissioner caused public notice of the judicial sale to be published and posted in accordance with Illinois statutes. (C638; C829-832). On June 28, 1986, a Notice of Public Sale was filed with the Illinois Trial Court and served on all parties of record. (C618-622). Over JCRT's objection, the sale was continued several times. Each time, the requisite Notice of Postponement was filed with the Illinois Trial Court, served on all parties of record and posted by the appointed commissioner. (C614-618; C639-41; C829). The sale finally occurred on July 24, 1986. (C829).

In Judge Eisen's Court, on the record, the commissioner first offered the Property in parcels, and receiving no such bids, offered the Property in its entirety. (C829-832; C942-973). JCRT was the only bidder at $10.4 million. (C829-832). JCRT's bid was subject to over $500,000 in unpaid real estate taxes and the $3 million Lincoln mortgage which, under the Agreed Foreclosure Judgment, was not foreclosed. (C613-617). Accordingly, JCRT's successful bid had an economic value of at least $13.9 million.

G. Confirmation of the Sale and Subsequent Disposition of the Property

On August 15, 1986, JCRT, Lincoln and the Fund jointly moved the Illinois Trial Court to confirm the July 24th judicial sale. (C828). After several evidentiary hearings, the sale was confirmed on September 3, 1986. (C982; C988). Based on undisputed appraisal testimony, the Illinois Trial Court held that JCRT's bid at the judicial sale realized the fair market value of the Property. (Transcript of Proceedings, 8/15/86, Volume III, at pp. 1-5 (Supplemental Record)). The Illinois Trial Court also found that there was no evidence of fraud or irregularity in the judicial sale.

(Transcript of Proceedings, 9/3/86, at pp. 52-55 (Supplemental Record)). No appeal was ever taken from the confirmation of the sale.

On December 23, 1986, JCRT sold the Property to a third-party purchaser for less net proceeds than JCRT had paid at the judicial sale. JCRT also lost money in the resale of the Property because it paid $579,610 in past due 1984 real estate taxes and $584,303 in principal and interest on the Lincoln mortgage that was not foreclosed. Additionally, JCRT gave the third-party purchaser a credit against the purchase price for payment of 1986 real estate taxes. (C1162-63).

H. Petitioner's Collateral Attacks on the Judicial Sale

On December 16, 1986, Petitioner filed in The Illinois Trial Court his Petition to Set Aside Order Confirming Sale and to Void the Commissioner's Sale ("Petition To Set Aside Order"). (Supplemental Record). Petitioner delayed that filing for over three months after confirmation of the judicial sale and for over eight months after the procedure was made part of the Agreed Bankruptcy Order. The sole basis of this Petition was a collateral attack that the foreclosure sale was void because it was held in a bankruptcy judge's courtroom on federal property. (*Id.*). After JCRT and the Fund filed motions to dismiss (C1005; C1008-1018), Petitioner abandoned this theory.

On January 15, 1987, Petitioner filed in the Illinois Trial Court his Amendment To Petition To Set Aside An Order Confirming Sale, To Void Commissioner's Sale, And To Void a Portion Of The Judgment Of Foreclosure (the "Amended Petition"). (C1125-1129). This Amendment came only after JCRT had closed a sale of the Property to a third-party purchaser. The Amended Petition maintained that the foreclosure sale was void because it had been

conducted by a commissioner rather than by a sheriff. Petitioner maintained that the Illinois Constitution prohibited the appointment of a commissioner.

I. Decisions Below

On March 31, 1987, after full briefing by the parties (C1005-24; C1136-61; C1173-1251; C1252-59), and hearing argument of counsel (Transcript of Proceedings, 3/23/87 (Supplemental Record)), the Illinois Trial Court denied the Amended Petition. (C1262; Transcript of Proceedings, 3/31/87 (Supplemental Record)). The Illinois Appellate Court affirmed. 185 Ill.App.3d 734, 542 N.E.2d 30 (1989). Among other things, the Appellate Court ruled that even if the appointment of a commissioner was beyond the statutory authority of the Illinois Trial Court, the error was not jurisdictional. 185 Ill.App.3d at 737, 542 N.E.2d at 32. Hence, the order was not void, as Petitioner contended but was, at most, voidable under *state* law principles, and therefore not subject to collateral attack. *Id.* As a completely alternative basis for its decision, the Illinois Appellate Court also held that the Bankruptcy Court had the authority to enter an agreed order requiring a foreclosure sale to be conducted by a commissioner. 185 Ill.App.3d at 738, 542 N.E.2d at 32. The Illinois Supreme Court denied leave to appeal on December 5, 1989. The instant petition for a writ of certiorari ("Petition") followed.

SUMMARY OF ARGUMENT

First, at the threshold, the decision of the Illinois Appellate Court rests on adequate and independent state grounds, viz., that in Illinois the conduct of a foreclosure sale by a commissioner is not void. Petitioner makes *no* claim that the conduct of a mortgage foreclosure sale by a commissioner violates the laws or Constitution of the United

States, and it is a well established principal of Federalism that this Court does not review decisions based on adequate and independent grounds of state law.

Second, and still at the threshold, Petitioner may not attack the Agreed Foreclosure Judgment: (a) because he agreed to it; and (b) because he demonstrates no injury to him from entry of that judgment. This Respondent knows of no case where certiorari has been granted to review an agreed order which did not harm the petitioner.

Finally, contrary to Petitioner Jackson's position, this case does not present any conflict with *Butner v. United States*, 440 U.S. 48 (1979) ("*Butner*"). While *Butner* stands for the proposition that "[p]roperty *interests* are created and defined by state law", 440 U.S. at 55 (emphasis added), it does not preclude a federal bankruptcy court from fashioning an agreed remedy which resolves a pending motion to lift the automatic stay by providing adequate protection to secured creditors.

ARGUMENT

I.

THE DECISION BELOW WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

A. The State Law Issues And Their Adequate State Law Resolution

The validity of the Agreed Foreclosure Judgment was resolved by the Illinois Courts on adequate state law grounds independently of applying any federal considerations. The first state law issue is whether a sale conducted by a commissioner is void. The resolution—that the sale is not void—was decided entirely on grounds of state law. The key

passage of the Illinois Appellate Court decision is as follows and it contains not a shred of federal jurisprudence:

> "Petitioner asserts, pursuant to *Factor*, that the sale was void because the trial court lacked statutory authority to appoint a commissioner. However, even if the trial court lacked statutory authority to appoint a commissioner, the error would not be jurisdictional. The error would result in a voidable judgment and would not, therefore, be the proper subject of a collateral attack. *Stark v. Stark* (1955), 7 Ill.App.2d 442, 444; *Phillips v. O'Connell* (1947), 331 Ill.App. 511, 528-29.
>
> "The case at bar is analogous to the situation in *Phillips v. O'Connell* (1947), 311 Ill.App. 511. In *Phillips*, a belated objection was made to the appointment of a special commissioner on the grounds that the trial court lacked statutory authority to refer chancery matters to a special commissioner. The appellate court held that the trial court properly had jurisdiction of the subject matter and the parties and that the improper reference resulted in a proceeding that was voidable at most. We, therefore, find that the trial court did not err in finding that the appointment of a commissioner to take bids at the sale in question did not result in a void proceeding."

185 Ill.App.3d at 737-38, 542 N.E.2d at 32.[3]

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[3] In fact, legislation has since established that conduct of a foreclosure sale by a commissioner is more than merely not void, it is affirmatively proper. The new Illinois Mortgage Foreclosure Law, Ill. Rev. Stat. ch. 110, ¶ 15-1101 *et seq.* (1987), came into effect shortly after the foreclosure sale at issue here, provides that a compensated special officer may perform the ministerial duty of selling real estate. Section 15-1506(f)(3) states that a party may request that a judgment name "an official or *other person* who

Having decided entirely on state law grounds that the agreed foreclosure judgment was not void (but was merely voidable), the Illinois Appellate Court then decided, the second state law issue, viz., whether to vacate the judgment. The Court's decision not to vacate the judgment relies exclusively on Illinois jurisprudence and is devoid of federal considerations:

> "The trial court, after finding that the order of June 13, 1986, was not void, also concluded that petitioner did not meet the requirements of section 2-1401 [of the Illinois Code of Civil Procedure] to have the order vacated on equitable grounds. A section 2-1401 petition invokes the court's equitable power to vacate a judgment attended by unfair, unjust or unconscionable circumstances and it is incumbent on the petitioner to show that his meritorious defense was diligently brought to the court's attention. *City of Chicago v. Central National Bank* (1985), 134 Ill.App.3d 22, 25.
>
> "We are in agreement with the trial court that petitioner failed to diligently protect his alleged rights. Since the order was entered with petitioner's consent, the motion to vacate was not raised until 6 months after its entry, and petitioner objected to confirmation of the sale on other grounds, we find that the trial court did not err in denying petitioner's petition to set aside the order

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shall be the officer to conduct the sale. . . ." (emphasis added). Moreover, ¶ 15-1506(f)(6) provides that a judgment of foreclosure may authorize "the fees to be paid out of the sale proceeds to an auctioneer, if any, who shall have been authorized to conduct a public auction sale." In short, the very procedure that Petitioner attacks in this case is now unambiguously authorized by Illinois statute as not conflicting with the Illinois Constitution.

> confirming the sale and voiding the commissioner's appointment."

185 Ill.App.3d at 738-39, 542 N.E.2d at 32-33. In sum, the decision below was clearly based on adequate state law grounds.

B. This Court Does Not Review Decisions Based On Adequate And Independent State Law Grounds

Beginning at least with *Murdock v. Memphis*, 20 Wall. 590, 636 (1874), it has long been the clear and unbroken policy of this Court not to review matters decided on state grounds, even when the state court may have alternatively based its decision on a misruling of federal law:

> "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Herb v. Pitcairn, 324 U.S. 117, 126 (1945). More recently, this Court has said:

> "Had the Ohio Court rested its decision on both state and federal grounds, either of which would have been dispositive, we would have no jurisdiction."

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 568 (1977).

Petitioner seeks to avoid this conclusive barrier to review by maintaining that "the State Court's interpretation of state law has been influenced by an erroneously broad interpretation of federal law." Petition at 14. Petitioner thereby both misapprehends this Court's criterion for review and misapprehends the reasoning and ruling of the Illinois Appellate Court. The criterion for review by this Court is

not one of "influence"; it is whether the state ground "is so interwoven with the other [federal ground] as not to be an independent matter[.]" *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). See also *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). This Court has said that "... when the adequacy and independence of any possible state law ground is not clear from the face of the opinion" it will accept review, but "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

In the instant case, it is crystal clear from the Appellate Court's opinion that the state law decision is bona fide, separate, adequate and independent. The Appellate Court determined as a matter of state law that the foreclosure sale was not void, and should not be vacated. The Appellate Court discussed apposite state law, citing and analyzing four Illinois decisions[4] plus section 2-1401 of the Illinois Code of Civil Procedure. Only after reaching its holding *solely* on its basis of such state law, did the Appellate Court move on to consider any federal issue.

Consequently, certiorari should be denied because the decision below was based on adequate and independent state grounds.

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[4] *Factor v. Factor*, 27 Ill.App.3d 594, 327 N.E.2d 396 (1st Dist. 1975); *Stark v. Stark*, 7 Ill.App.2d 442, 129 N.E.2d 776 (1st Dist. 1955); *Phillips v. O'Connell*, 331 Ill.App. 511, 73 N.E.2d 864 (1st Dist. 1947); *City of Chicago v. Central National Bank*, 134 Ill.App. 3d 22, 479 N.E.2d 1040 (1st Dist. 1985).

II.

PETITIONER MAY NOT ATTACK THE AGREED FORECLOSURE JUDGMENT

A. Petitioner May Not Attack A Judgment To Which He Agreed

The instant controversy is predicated on the alleged invalidity of a foreclosure sale procedure to which the Jackson Partnership expressly consented. Petitioner relegates to a footnote his excuse for continuing to pursue this litigation, claiming that "erroneous stipulations of law may be set aside". Petition at 13, n. 4. But that misstates the issue. The real issue is whether Petitioner may collaterally attack a mutually fashioned remedy upon which the Fund and other creditors relied in relinquishing valuable rights.

Petitioner's conduct is similar to that which was condemned by the United States Court of Appeals for the Seventh Circuit in *Citation Cycle Co., Inc. v. Yorke,* 693 F.2d 691 (7th Cir. 1982). In that case, the parties put before Bankruptcy Judge Thomas James a stipulation stating that no facts were in dispute and placing before him the single legal issue as to when a certain creditor's lien on goods arose. This, in turn, would determine when (not whether) an act of bankruptcy had been committed, and would have important consequences for creditors. The bankruptcy judge proceeded to decide when the lien had arisen. *See* 693 F.2d at 692-693. Subsequently, the bankrupt collaterally attacked the judge's ruling by maintaining that it had never committed an act of bankruptcy at all so that the whole case had been invalidly commenced, and that the judge, in turn, lacked authority to have decided when the lien arose. The Court of Appeals stated:

> "Estoppel 'arises * * * when one has so acted as to mislead another and the one thus misled has relied

> upon the action of the inducing party to his prejudice.' [citation omitted]
>
> "Citation's stipulation estops it to raise the issues now comprehended in this appeal. Citation had represented to Judge James that the only issue he had to decide was when an Illinois judgment ripens into a lien .... The creditors too were entitled to rely, and clearly did rely, on the fact that, however much this litigation resembled trench warfare, at least the one stipulated issue decided by Judge James in December of 1977 was settled." [footnote omitted].

See 693 F.2d at 695-696.

In this case, the Fund, as well as the other creditor parties to the Agreed Bankruptcy Order, relied on the consent of the Jackson Partnership to all its provisions. A material component was the provision to hold a foreclosure sale of the Property in a stated manner should the Jackson Partnership fail to sell the Property within a stated time. In exchange for that benefit, the creditor parties detrimentally relinquished a panoply of rights and remedies under Title 11 of the United States Code, including, without limitation: the right to seek appointment of an examiner and/or a trustee (11 U.S.C. § 1104); the right to seek a conversion of the case to a Chapter 7 case (11 U.S.C. § 1112); the right to seek a sale or offering for sale of the Property through the bankruptcy court (11 U.S.C. §§ 363(b) and 363(f)); and the right to seek an immediate and complete termination of the automatic stay (11 U.S.C. § 362(d)).

Accordingly, just as the parties' stipulation equitably estopped the appellant from collaterally attacking the proceedings in the *Citation Cycle* case, so Petitioner's participation in the Agreed Bankruptcy Order equitably estops him from invoking the review and aid of this Court. *See also In*

re Reliable Mfg. Corp., 17 B.R. 899, 904 (N.D. Ill. 1981) *aff'd* 703 F.2d 996 (7th Cir. 1983) ("A party is estopped from asserting that a transaction which it freely entered and benefitted from does not now bind it because of its invalidity"); *Handler v. SEC*, 430 F.Supp. 71 (C.D. Cal. 1977), *aff'd* 610 F.2d 656 (9th Cir. 1979) (corporate directors who voted for consent decree were estopped from complaining of effects of report of special counsel provided for in the decree). Therefore, certiorari should be denied.

Petitioner's tardy collateral attack with its utterly nebulous implication that Petitioner was somehow harmed is similar to an appellant's position which the Illinois Appellate Court rejected in another foreclosure case as follows:

> "Appellants did not raise the alleged collusion issue in their original motion to vacate the decree. The argument made in this court makes out a nebulous case of collusion at best, and appeals to the equitable powers of this court to affirm their position. Balancing these factors against the oft-stated position of the Supreme Court that, as a matter of public policy, stability should be given to judicial sales, it is our conclusion that the order of the circuit court dismissing the petition to vacate and denying leave to file an amended complaint should be affirmed."

Uptown Federal Savings and Loan Association Of Chicago v. Walsh, 15 Ill.App.3d 626, 633-34, 305 N.E.2d 74, 80 (1st Dist. 1973). While not framed as an estoppel case, *Uptown* rightly emphasizes the importance of finality in foreclosure sales—an equity which is entirely in Respondents' favor in the instant case and which requires that certiorari be denied.

B. Petitioner Was Not Injured By The Judgment.

The most curious feature of Petitioner's dogged pursuit of appellate relief in Illinois and in this Court is that he never alleges (much less shows) how he was injured because a foreclosure sale was conducted by a commissioner rather than by a sheriff. No meaningful contention has ever been advanced that a higher sale price would have been realized if a sheriff had conducted the sale; indeed, the Illinois Trial Court heard extensive evidence that the sale was fair and that no higher or better offer existed.[5] Accordingly, on this record, it is clear that Petitioner has suffered no injury, and therefore lacks standing.

Moreover, there is no showing how the relief requested by Petitioner would provide redress. Yet this Court has emphatically stated:

> "... at an irreducible minimum, Art. III requires the party who invokes this court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' ... and that the injury 'fairly can be traced to the challenged ac-

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[5] Illinois law is clear that if the sale was fair, it need not be re-held just because a slightly higher price may be obtained "... it is a firmly established rule that unless there is evidence of mistake, fraud or violation of duty by the officer conducting the sale, mere inadequacy of price alone is not sufficient cause for setting aside a judicial sale.... It is the policy of the law to give stability and permanency to judicial sales." *Illini Federal Savings and Loan Association v. Doering,* 162 Ill.App.3d 768, 771, 516 N.E.2d 609, 611 (5th Dist. 1987) (citations omitted). Of course, in the instant case, there is not even any evidence suggesting that a higher price really could have been obtained if the sale had been conducted by a sheriff.

> tion' and 'is likely to be redressed by a favorable decision'. . . ." [Citations omitted].

Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Moreover, even though Jackson self-righteously protests the alleged illegality of having had a commissioner conduct a foreclosure sale,

> "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."

Allen v. Wright, 468 U.S. 737, 754 (1984). Consequently, certiorari must be denied for the simple and fundamental reason that Petitioner was never injured and therefore lacks standing to confer jurisdiction on this Court.

III.

THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *BUTNER*

After analyzing §105(a) of the Bankruptcy Code, the Illinois Appellate Court concluded that "the appointment of a commissioner pursuant to the agreed bankruptcy order entered by the Federal bankruptcy court was valid even if the Illinois Constitution were to be construed so as to prohibit the appointment of a commissioner in these circumstances." *See* 185 Ill.App.3d at 738, 542 N.E.2d at 32.

Petitioner Jackson erroneously maintains that such holding conflicts with *Butner v. United States*, 440 U.S. 48 (1979). In *Butner*, this Court considered whether federal law should afford a mortgagee a security interest in rents of a bankrupt, even if state law would not recognize that interest until after foreclosure. *See* 440 U.S. at 53. This Court concluded that property *interests* are created and

defined by state law, 440 U.S. at 55, and that state law should always be followed in determining the mortgagee's security interest in rents. However, while *Butner* may defer to state law in determining a party's interests in property, it does not preclude a bankruptcy court from taking appropriate steps to protect and enforce those interests. Indeed, in the *Butner* decision itself, Justice Stevens suggested that a bankruptcy court could take steps to sequester rents in which a mortgagee's interest might not be perfected at state law. *See* 440 U.S. at 57.

Butner actually had a narrow holding. "The Supreme Court held only that a bankruptcy court must look to state law to determine a mortgagee's interest." *In re Gotta*, 47 B.R. 198, 201 (Bankr. W.D. Wisc. 1985). Nothing done in the instant case in any way contravenes that principle. In the instant case, the substantive rights of the mortgagees in property were at all times determined in accordance with Illinois state law. All that happened was that the Bankruptcy Court (with the consent of all affected parties in this case) exercised its equitable powers to implement a remedy protecting the mortgagee's state law interests in property. Such action by the Bankruptcy Court is expressly authorized by § 105(a) and § 361(3) of the Bankruptcy Code, and in no way violates *Butner*.

Section 105(a) of the Bankruptcy Code provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Among the provisions of "this title" (Title 11) are those requiring adequate protection of the interests of secured creditors.[6] Adequate protec-

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[6] "Adequate protection" refers to the preservation of the value of a secured creditor's lien or security interest throughout the pendency of a bankruptcy case. The requirement that secured

tion includes "granting such other relief . . . as will result in the realization by [the creditor] of the indubitable equivalent of [its] interest in such property." 11 U.S.C. § 361(3). Consequently, the bankruptcy court's ability to require that a state court foreclosure be conducted by a commissioner flows naturally from its plenary powers under § 105 and § 361(3) of the Bankruptcy Code to adequately protect the economic interests of creditors. Indeed, the need for bankruptcy courts to be able to fashion remedies which protect the state law interests of creditors in property is a primary purpose of § 105(a) of the Bankruptcy Code. *See, In re Feit & Drexler, Inc.*, 760 F.2d 406, 415 (2d Cir. 1985) (§ 105(a) provides bankruptcy court with broad power to achieve goal of protecting interests of the creditors and of the debtor).

The propriety of appointing a commissioner to conduct a foreclosure sale follows from the fact that § 105 is often employed in ways which demonstrably supersede state law. For example, § 105(a) has been employed to enjoin creditors from pursuing substantive state remedies. In *MacArthur Company* v. *Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988), *cert. denied* 109 S.Ct. 176 (1989) the bankruptcy court was found to have the power to enjoin suits against the debtor's products liability insurer as part of the bankruptcy court's approval of a settlement between the debtor and that insurer. *See also In re Davis*, 730 F.2d 176 (5th Cir. 1984). *A fortiori*, the decision in *Butner* does not preclude the Bankruptcy Court in the instant case from having issued an

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creditors' interests be adequately protected is grounded in the fifth amendment's protection of property interests. *See, Wright v. Union Central Life Ins. Co.*, 311 U.S.. 273 (1940); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). *See also, In re Murel Holding Co.*, 75 F.2d 941 (2d Cir. 1935) (per Hand, J.).

agreed order which provided for the mere substitution of a commissioner for a sheriff to act as auctioneer for a foreclosure sale.

Petitioner's premise that a bankruptcy court cannot supersede a state remedy is quite mistaken. In its broadest sense, the entire Bankruptcy Code is a creditor's remedy providing for a distributive mechanism which overrides state law. Nor is there any question that such a legislative scheme is valid under the bankruptcy clause (Article I, § 8, clause 4) of the United States Constitution which empowers Congress "to establish . . . uniform laws on the subject of bankruptcy throughout the United States" and under the supremacy clause (Article VI, clause 2) of the United States Constitution which provides in relevant part: "the Laws of the United States . . . shall be the supreme Law of the Land; . . .". See *Elliott v. Bumb*, 356 F.2d 749, 755 (9th Cir. 1966) *cert. denied*, 385 U.S. 829 (1966) ("If state law is contrary to federal bankruptcy law, the state law must yield") (citing bankruptcy and supremacy clauses of the Constitution); *Rhodes v. Stewart*, 705 F.2d 159, 163 (6th Cir. 1982) *cert. denied* 464 U.S. 983 (1983) (state and federal legislatures shared concurrent authority to promulgate bankruptcy laws, but the supremacy clause and the doctrine of preemption will invalidate state promulgations inconsistent with federal law).

Consequently, the general supremacy of the Bankruptcy Code is well established, and there is nothing in the *Butner* decision which limits the remedial powers of the bankruptcy court to afford adequate protection under the provisions of Bankruptcy Code § 361(3) and § 105, once it has been established that a creditor is secured under state law. Therefore, the decision of the Illinois Appellate Court in no way contravenes this Court's decision in *Butner*. Rather, the Illinois Appellate Court correctly recognized

that under undisputed principals of supremacy and preemption, the Bankruptcy Court could fashion a remedy requiring that a foreclosure sale be conducted by a commissioner even if, *arguendo*, state law in and of itself did not authorize the appointment of such a commissioner. Accordingly, no substantial issue is presented and certiorari should be denied.

Finally, a suppressed premise of Petitioner's argument is that he has an "interest in property" under state law to have a foreclosure sale conducted by a sheriff rather than by a commissioner. The characterization of a particular aspect of foreclosure procedure as an "interest in property" is unfounded. Petitioner's actual complaint is in the nature of an alleged violation of due process because of the manner in which the foreclosure sale was conducted. But Petitioner has never raised a state or federal due process issue; nor can he, for the Illinois Appellate Court found that "there are no allegations of fraud in the sale proceedings," 185 Ill.App.3d at 737, 542 N.E.2d at 32, and the Illinois Trial Court concluded that the sale price was fair after it heard extensive evidence. Consequently, this case actually presents no real issue under *Butner*.

CONCLUSION

Certiorari should be denied in this case for each and every of four reasons: (1) the decision below was based on adequate and independent state grounds; (2) Petitioner may not seek review because he agreed to the judgment for which he seeks review and was not injured by it; (3) the decision below does not conflict with this Court's decision in *Butner v. United States.*

Respectfully Submitted,

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April, 1990.

No. 89-1432

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WAYNE P. JACKSON,

Petitioner,

vs.

JOHNSTOWN/CONSOLIDATED REALTY TRUST and TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FOURTH DIVISION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Supremacy Clause of the United States Constitution and Sections 105 and 363 of the Bankruptcy Code, a Bankruptcy Court may enter an order agreed to by a debtor that specifies the use of a commissioner to take bids on the sale of real property of the debtor.

2. Whether the closing of the sale of the real property of a debtor pursuant to a procedure authorized by a Bankruptcy Court renders this appeal moot by virtue of §363(m) of the Bankruptcy Code.

3. Whether the sole general partner of a debtor, who suffered no loss, who lacks any ownership interest in real property and is not liable for loans secured thereby, has standing to collaterally attack the procedure for the sale of real estate that was agreed to by the debtor.

4. Whether the Court should exercise its authority under Sup. Ct. R. 23.1, notwithstanding the independent basis for the decision below in the substantive and procedural law of the State of Illinois.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner's recitation of the applicable statutory and constitutional provisions is satisfactory except as set forth below:

11 U.S.C. §363 provides, in pertinent part:

§ 363. Use, sale, or lease of property.

[. . .]

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

[. . .]

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if --

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

[. . .]

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Illinois Revised Statute, ch. 110, ¶ 15-1506 (1987) provides, in pertinent part:

§ 15-1506. Judgment.

[. . .]

(f) Special Matters in Judgment. Without limiting the general authority and powers of the court, special matters may be included in the judgment of foreclosure if sought by a party in the complaint or by separate motion. Such matters may include, without limitation:

[. . .]

(3) an official or other person who shall be the officer to conduct the sale other than the one customarily designated by the court;

[. . .]

(6) the fees to be paid out of the sale proceeds to an auctioneer, if any, who shall have been authorized to conduct a public auction sale;

[. . .]

(14) such other matters as approved by the court to ensure sale of the real estate for the most commercially favorable price for the type of real estate involved.

(g) Agreement of the Parties. If all of the parties agree in writing on the minimum price and that the real estate may be sold to the first person who offers in writing to purchase the real estate for such price, and on such other commercially reasonable terms and conditions as the parties may agree, then the court shall order the real estate to be sold on such terms, subject to confirmation of the sale in accordance with Section 15-1508.

IN THE

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FOURTH DIVISION

STATEMENT OF THE CASE

Petitioner was the sole general partner of 29 East Madison Associates (the "Partnership"), an Illinois limited partnership that in turn had the power of direction over an Illinois land trust (the "Trust"). The Trust held legal title to the commercial office building and leased the land that was the subject of a mortgage foreclosure action (the "Property"). (C305). The Property was encumbered by three mortgage liens as of January 3, 1986. The first mortgage was held by respon-

dent Trustees of Central States, Southeast and Southwest Areas Pension Fund. (C03-04). Lincoln National Pension Insurance Company ("Lincoln") held the second mortgage. (C03). The third mortgage was held by respondent Transcontinental Realty Investors, a California business trust then known as Johnstown/Consolidated Realty Trust ("TRI"). (C90-111). These mortgages secured a principal amount of debt in excess of $12 million. (C610).

Following a default by the Partnership on its mortgage payments, respondents sued the Partnership in the Circuit Court of Cook County to foreclose their mortgage liens on the Property. (C02). On February 13, 1986, the Partnership stayed the suit by filing a voluntary petition under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Northern District of Illinois.

On April 28, 1986, the Bankruptcy Court entered an agreed order (the "Agreed Order") that settled vigorous litigation by setting a procedure for the sale of the Property, which was the sole asset of the petitioner's Partnership. The owner of the land, the Trust that owned the building, counsel for petitioner's Partnership, which had a power of direction over the Trust, and counsel for the respondents all stipulated to the entry of the Agreed Order. (C467). The Agreed Order set the terms of an agreed order of foreclosure for the judicial sale of the Property. Before the judicial sale would be held, however, the petitioner's Partnership was given a grace period of several months in which to find a third-party purchaser for the Property. (C477). The Partnership failed to find a purchaser within the specified period of time.

On June 13, 1986, pursuant to the Agreed Order and an additional stipulation by the same parties, the Agreed Order for Judgment of Foreclosure (the "Foreclosure Order") was entered by the Circuit Court of Cook County. (C605). The Foreclosure Order and the Agreed Order called for the judicial sale of the Property on July 7, 1986. Pursuant to both the Agreed Order and the Foreclosure Order, the Circuit Court of Cook County appointed a commissioner to take bids in the

foreclosure sale of the Property in the Bankruptcy Court. (C613).

The appointment of a commissioner to conduct the sale was necessary because the Sheriff of Cook County, Illinois will only hold foreclosure sales at the Cook County courthouse. The Bankruptcy Court, however, required that the foreclosure sale of the debtor Partnership's sole asset be conducted under its observation.

The foreclosure sale took place on July 24, 1986. TRI was the only bidder at $10.4 million. (C829-832). On August 15, 1986, respondents and Lincoln jointly moved to confirm the sale. (C828). The sale was confirmed by the Illinois Circuit Court on September 3, 1986. (C982, C988).

Petitioner never appealed from any of the orders of the Bankruptcy Court or Illinois Circuit Court that authorized or confirmed the sale.

Petitioner first attempted to collaterally attack the sale on December 16, 1986 -- more than six months after the Foreclosure Order was entered and three months after the sale had been confirmed. Petitioner filed a petition to vacate the Illinois Circuit Court's order confirming the foreclosure sale and the foreclosure sale conducted by the commissioner. Petitioner argued that the sale was void because the agreed Foreclosure Order provided for a sale in a building owned by the United States. (Petition, App. 1, at A-3).

On January 15, 1987, after TRI resold the Property to a third party purchaser, petitioner abandoned his earlier grounds. Instead, petitioner claimed that the Foreclosure Order and the order confirming the sale were void because the Illinois constitution and local state court rules prohibited a commissioner from taking bids in a real estate foreclosure sale. (C1125).

On March 3, 1987, the Circuit Court of Cook County denied petitioner's amended motion to vacate. It held that Illinois law barred a collateral attack because its Foreclosure

Order was not void, had been entered with petitioner's consent, and had not been objected to until six months after its entry. (C1262).

On June 22, 1989, the Illinois Appellate Court, First District, Fourth Division, denied petitioner's appeal from the order rejecting petitioner's collateral attack. Petitioner argued that the Illinois Constitution and the rules of the Circuit Court prohibited the Circuit Court of Cook County from entering the Foreclosure Order because it provided for the sale of the Property by a commissioner. (Petition, App. 1, at A-3 to A-5; *See also* Appendix A attached hereto at A-2 to A-5).

The Illinois Appellate Court rejected these arguments because petitioner's collateral attack on the judgment of foreclosure was untimely, even if it did authorize a commissioner. (Petition, App. 1, at A-3 to A-4). The court also determined that the sale procedure was valid because it was authorized under the Bankruptcy Court's broad authority to sell a debtor's assets under the Bankruptcy Code. (Petition, app. 1, at A-5).

On or about July 17, 1989, petitioner unsuccessfully petitioned the Illinois Appellate Court for a rehearing. A copy of that petition is attached hereto as Appendix A. The petition for rehearing did not raise the issues set forth in the Petition to this Court or any other impropriety with the Bankruptcy Court's authorization of the sale procedure. (*See* A-2 to A-5 below). The petition for rehearing was denied on August 1, 1989.

On December 5, 1989, the Illinois Supreme Court denied petitioner's Petition for Leave to Appeal. A copy of that petition is attached hereto as Appendix B. Petitioner essentially restated his earlier grounds for appeal and did not raise the federal question stated in the Petition regarding the Bankruptcy Court's authorization of the sale. (*See* B-4 to B-6 below).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH FEDERAL DECISIONS.

Petitioner never demonstrates a conflict between the Illinois Appellate Court's decision and this Court's holding in *Butner v. United States*, 440 U.S. 48 (1979) (*See* Petition at 8-10). Supreme Court Rule 10.1(c), however, limits review by a writ of certiorari to those cases "When a state court ... has decided an important question of federal law in a way that conflict with applicable decisions of this Court."

Despite petitioner's assertion that "this case falls squarely within the scope of Sup. Ct. R. [10.1(c)]", petitioner does not establish that the state court (i) decided a federal question, or (ii) contradicted this Court's precedent. (Petition at 8). The failure to establish *either* point is fatal to his petition.[1]

A. The Decision Below Is Based Upon Independent And Adequate State Law Grounds.

This Court should not review the decision of the Illinois Appellate Court because it does not turn on a federal question. It rests upon adequate and independent non-federal grounds, even if a federal questions also was decided. *See, e.g., Smith v. Smith*, 366 U.S. 210 (1961); *Wilson v. Loews Inc.*, 355 U.S. 597 (1958).

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[1]Although petitioner argues that Rule 10.1(c) (formerly Rule 17.1(c)) applies in this case, he demonstrates his own confusion regarding the requirements for a writ of certiorari by stating that the issue before this Court is whether "a state court, ... [may] suspend or nullify the state constitution, ... and thereby sustain a judicial sale of real estate not conducted in accord with applicable state law?" (Petition, Questions Presented). This issue falls squarely outside the ambit of Rule 10.1(c).

Review is particularly inappropriate here because the decision below rests on independent and adequate grounds of Illinois procedural and substantive law. *Henry v. Mississippi*, 379 U.S. 443, 446, *rehearing denied*, 380 U.S. 926 (1965). This Court will not entertain an appeal of the state court decision that is based upon well-established local procedural rules. *Wolfe v. North Carolina*, 364 U.S. 177, 192-93, *rehearing denied*, 364 U.S. 856 (1960). So long as there is no allegation that the state court based its decision on independent state procedural grounds as a means of avoiding a federal question, this Court will accept the state court decision whether right or wrong. *Id.* at 195; *Nickel v. Cole*, 256 U.S. 222, 225 (1921).

This Court should decline to render the advisory opinion that petitioner requests. When a lower court's opinion rests upon independent and adequate state law grounds, any federal decision is peripheral to the lower court's decision. Thus, an opinion on the peripheral issue by this Court would only be an advisory opinion that would have no affect on the outcome of the underlying opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

In each of the prior appeals, the petitioner argued that the Foreclosure Order was void, and thus subject to collateral attack, because the sale of real estate pursuant to a judgment of foreclosure and sale entered by a Circuit Court requires that the property be sold by the Sheriff of Cook County. Petitioner based his assertion upon the Illinois Constitution's prohibition of fee officers in the judicial system and the local rules of the Circuit Court of Cook County. Ill. Ann. Stat., 1970 Const., Art. VI, 14; Circuit Court of Cook County, Illinois Rule No. 7.1(a). (Petition, App. 1, at A-4). Thus, petitioner contended that the Foreclosure Order was not voidable, but void due to a lack of statutory authority.

Whether the Foreclosure Order was void was *the critical issue in the state courts*. The Illinois Appellate Court affirmed the denial of the collateral attack on this ground. The court reasoned that "'[a]ny petition to vacate an order, judgment or decree filed more than 30 days after entry thereof, even though made to the court that rendered it, constitutes collateral

attack.'" (Petition, App. 1, at A-3, quoting *People v. O'Keefe*, 18 Ill. 2d 386, 164 N.E.2d 5, 9 (1960)).

The Illinois Appellate Court further held that the Foreclosure Order was not void because, under Illinois law, orders authorizing judicial sales are void only if the petitioner proves (i) fraud in procuring the sale, or (ii) the court's lack of personal or subject matter jurisdiction. (Petition, App. 1, at A-4).

The Illinois Appellate Court held that the Foreclosure Order was not void under either possible basis. First, petitioner never alleged fraud in the procurement of the order. (Petition, App. 1, at A-4). Second, the alleged lack of statutory authority to appoint a commissioner did not affect the personal or subject matter jurisdiction of the Circuit Court of Cook County. (Petition, App. 1, at A-4 to A-5).

Because the Foreclosure Order was not void, the Illinois Appellate Court affirmed the denial of petitioner's motion to vacate:

> We are in agreement with the trial court that petitioner failed to diligently protect his alleged rights. Since the order was entered with petitioner's consent, the motion to vacate was not raised until 6 months after its entry, and petitioner objected to confirmation of the sale on other grounds, we find that the trial court did not err in denying petitioner's petition to set aside the order confirming the sale and voiding the commissioner's appointment.

(Petition, App. 1, at A-6).

The foregoing independent and adequate state law grounds for the decision below should bar the relief sought be petitioner. Illinois law and public policy promotes the certainty of judicial sales of real estate by severely limiting possible collateral attacks thereon. This Court should not interfere with that longstanding, sound policy -- even if the Illinois Appellate

Court decided, incorrectly, that federal law independently justified the result by authorizing the use of a commissioner of sale.

B. The Appellate Court's Decision Does Not Conflict With *Butner v. United States*

Petitioner also fails to meet the second requirement of Rule 10.1(c) -- a conflict between the state court's opinion and applicable decisions of this Court. The Illinois Appellate Court's decision does not conflict with the only decision cited by petitioner, *Butner v. United States*, 440 U.S. 48 (1979). Despite the petitioner's lengthy discussion of *Butner*, he never identifies an actual conflict between the Illinois Appellate Court's decision and *Butner*. (*See* Petition, at 8-10).

In fact, no conflict exists. *Butner* addressed the issue of the means of determining a mortgagee's ownership rights to rents from real property following the mortgagor's bankruptcy petition. 440 U.S. at 49 - 50. This Court held that ownership interests in real property are determined by the law of the state where the property is located:

> ... Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

Id. at 55, 56.

The Illinois Appellate Court's decision had nothing to do with the existence or extent of the liens or interests in the Property. The Bankruptcy Court had already determined in the Agreed Order those issues with the agreement of all holders of those interests. The only issue determined below was the issue that petitioner raised -- whether, under Illinois law, the foreclosure judgment was void and petitioner's collateral attack was timely. Thus, the decision focused on the petitioner's failure to comply with Illinois procedural rules in

his belated attempt to collaterally attack the judgment of foreclosure. Whether a sheriff or a commissioner takes a bid -- to be confirmed by a judge -- does not "create" or "define" a property interest.

The brief reference to the Supremacy Clause of the United States Constitution in the Illinois Appellate Court's decision does not create a conflict with *Butner.* Indeed, the decision follows the discussion of the Supremacy Clause in *Butner.* The decision below states:

> ...Respondents are correct in their assertion that the agreed bankruptcy order supersedes the applicable state law regardless of any alleged impropriety of the sale by an appointed commissioner.
>
> '...Any such laws promulgated by the Congress operate to suspend any state law in conflict with them. ...' [citation omitted] We, therefore, find that the appointment of a commissioner pursuant to the agreed bankruptcy order entered by the Federal bankruptcy court was valid even if the Illinois Constitution were to be construed so as to prohibit the appointment of the commissioner in these circumstances.

(Petition, App. 1, at A-5 to A-6).

Butner also discussed the Supremacy Clause using nearly the same terms: "'[I]t has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended.'" 440 U.S. at 54 n.9. (citing *Stellwagen v. Clum*, 245, U.S. 605, 613 (1918)).

Furthermore, the Illinois Appellate court correctly recognized the bankruptcy court's authority to establish the procedures for the sale of the principal asset of a debtor under the Bankruptcy Code. Numerous decisions validate the flexibility of the Bankruptcy Court in fashioning the procedures

for the sale of a debtor's assets under Sections 105 and 363 of the Bankruptcy Code, 11 U.S.C. Sections 105, 363. *See, e.g., In re Muscongus Bay Co.*, 597 F.2d 11 (1st Cir. 1979); *In re Brookfield Clothes, Inc.*, 31 B.R. 978 (S.D.N.Y. 1983); *In re Alves*, 52 B.R. 353 (Bankr. D.R.I. 1985). If, as here, the Bankruptcy Court wished to appoint a commissioner to take bids so that the court could observe the sale, it had ample authority to do so. Petitioner was given months to use whatever means it could to sell the Property. If it failed to do so, a commissioner's sale was specifically approved.

Even if a federal question was decided below, no writ of certiorari should issue because there no conflict exists between the decision below and a decision of this Court. Petitioner cannot satisfy the second requirement of Rule 10.1(c).

II. PETITIONER'S ISSUES DO NOT WARRANT REVIEW.

Even if petitioner could satisfy Rule 10.1(c), he does not raise any special and important reason to review the decision below. A writ of certiorari, which provides the manner of invoking this Court's appellate jurisdiction of state court judgments, "'is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.'" *Fay v. Noia*, 372 U.S. 391, 436 (1963).

A. The Petitioner Has Not Previously Raised The Issue Upon Which His Petition Is Based.

This Court should not consider whether the Illinois Appellate Court decided a question of federal law in conflict with *Butner* because petitioner never raised this issue in the state courts. (Appendix, at A-2 to A-5, B-4 to B-6). In his Petition for Rehearing before the Illinois Appellate Court, petitioner never asserted that the court's prior decision *even raised* a federal question -- let alone that the court had determined a federal question so as to conflict with a decision of this Court. Instead, petitioner argued that the court's decision

was a misapplication of both Illinois procedural and case law. (*See* A-2 to A-5 below).

Petitioner also ignored any federal law issue in his Petition for Leave to Appeal to the Illinois Supreme Court. Petitioner limited his argument to the Illinois procedural and case law that was the true basis for the Illinois Appellate Court's decision. (*See* B-4 to B-6 below). In seeking reversal of the decision below in the Illinois state courts, petitioner never cited or discussed *Butner* or any other federal case law.

This Court should invoke its well-founded policy not to review a decision to resolve issues not presented by the petitioner in the lower court from which the appeal is brought. *Illinois v. Gates*, 462 U.S. 213, 219, *rehearing denied*, 463 U.S. 1237 (1983). When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). "The Court has consistently refused to decide federal . . . issues raised here for the first time on review of state court decisions." *Id.* at 938. Thus, when the issue has not been appealed or argued before either the state appellate court or state supreme court, this Court will refuse to hear that issue. *Clark v. Jeter*, 486 U.S. 456 (1988) (Court will not review a state court decision where petitioner first raises a federal question on appeal to Supreme Court, after only asserting issues of state law before lower court); *Webb v. Webb*, 451 U.S. 493, 498 (1981) (certiorari petition dismissed because petitioner's briefs in state court did not raise federal issue, and instead argued state law issues).

The rule and its rationale apply here: "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Petitioner's failure to raise his so-called "federal law issue" resulted in a record that is inadequate with regard to whether the Illinois Appellate Court's decision is in conflict with *Butner*. *Cardinale*, 394 U.S. at 439. Therefore, this Court

should deny petitioner's request for a writ of certiorari. *Webb*, 451 U.S. at 498.

B. Any Federal Question is Moot.

Petitioner's issue became moot when the sale to TRI closed. In an oblique way, he challenges the Bankruptcy Court's Agreed Order, which modified the automatic stay, approved the appointment of a commissioner, and approved the form of the Foreclosure Order. Numerous cases decided under Section 363(m) of the Bankruptcy Code hold that appeals from the order approving a sale became moot once the sale closes. *See, e.g., In re Highway Truck Drivers & Helpers Local Union 107*, 888 F.2d 293 (3d Cir. 1989); *In re Royal Properties, Inc.*, 621 F.2d 984 (9th Cir. 1980).

Here, TRI purchased the Property and later resold it to an unrelated third party. If petitioner wanted to stop the sale, he should have sought a stay pending appeal and posted the multi-million dollar bond that would have been required. Section 363(m) strongly upholds federal judicial sales (much like the Illinois policy and law that barred petitioner's belated collateral attack). This Court should not undercut that policy by granting a writ to petitioner.

C. The Issue Is Not Important Because It Will Not Arise Again.

The repeal and replacement of the former Illinois mortgage foreclosure statute undercuts the importance of this case -- as well as petitioner's argument. Shortly after the foreclosure sale at issue here, Illinois repealed its former foreclosure statute and enacted a completely revised Illinois Mortgage Foreclosure Law. Ill. Rev. Stat., ch. 110, ¶¶ 15-1101 *et. seq.* (1987). One of the reforms of the new law permits a compensated officer of the court, or even a real estate broker, to perform the ministerial duty of selling real estate. Although not specifically applicable to the sale here, this reform was intended to conform the foreclosure process to the practices of the modern real estate market and to more regularly obtain a fair price. Ill. Rev. Stat., ch. 110, ¶ 15-1506(f)(14) (1987).

The new statute expressly validates the procedure used in this case. It allows persons other than the sheriff or a court to take bids, so long as the court confirms the sale. Paragraph 15-1506(f)(3) of the Statute states that a party may request that a judgment name "the official or other person who shall be the officer to conduct the sale . . ." ¶ 15-1506(f)(3). Under ¶ 15-1506(f)(6), the judgment of foreclosure may authorize "the fees to be paid out of the sale proceeds to an auctioneer, if any, who shall have been authorized to conduct a public auction sale." ¶ 15-1506(f)(6). In addition, ¶ 15-1506(f)(14) provides that the judgment can include "such other matters as approved by the court to ensure sale of the real estate for the most commercially favorable price for the type of real estate involved."

Under a long-standing policy of this Court, certiorari will not be granted if an issue is no longer a live one. If the statute upon which an alleged controversy rests has been amended or expired so that the issue will not arise in the future, certiorari will be denied. *See, e.g., United States. v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 932 (1952).

The parties to the Bankruptcy Court's order should not be penalized for anticipating the new foreclosure statute. The Agreed Order and the new foreclosure statute allow the parties with interests in real estate to agree on the means to get the highest sale price -- without depending on courts or sheriffs to do the job of professional real estate brokers or auctioneers. Ill. Rev. Stat., ch. 110, ¶ 15-1506(g) (1987). The changes in the Illinois Mortgage Foreclosure Law also make the issue raised here unlikely to arise again. Certiorari clearly is unwarranted.

D. The Petitioner Lacks Standing And Alleges No Real Injury.

To obtain relief in this Court, a petitioner must demonstrate that the enforcement of the underlying state court judgment will deprive him, not another, of some right. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing*

Ass'n, 276 U.S. 71, 88 (1928). Thus, a party seeking review cannot invoke the jurisdiction of this Court to vindicate a right of a third party. *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 (1984); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Furthermore, the petitioner "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, *rehearing denied*, 468 U.S. 1250 (1984).

In the present case, petitioner seeks to assert a right of a third party, and not a right of his own. The Property upon which respondents foreclosed was owned by the Trust. Neither the underlying state court foreclosure proceeding, nor the underlying bankruptcy proceeding of the Partnership, ever involved the petitioner in his personal capacity.

Petitioner improperly requests a writ of certiorari in his own name, not on behalf of the Partnership, *which twice stipulated to the sale procedure and directed the Trust, as owner of the Property to do so.*[2] Under Illinois law, a partnership must assert its rights in the name of all of its partners, not just the name of the general partner. *Excalibur Oil, Inc. v. Sullivan*, 659 F. Supp. 1539, 1540-41 n.1 (N.D. Ill. 1987); *Robb Container Corp. v. Sho-Me Co.*, 566 F. Supp. 1143, 1155-56 (N.D. Ill. 1983). Thus, petitioner's request for a writ is an attempt to assert a right of a third party, the Partnership, and should be denied.

Petitioner's request for a writ also should fail because petitioner suffered no personal injury that is likely to be redressed by the relief requested. *Allen*, 468 U.S. at 751. The Illinois Appellate Court so held: "... petitioner was not prejudiced by the appointment of the commissioner." (Petition,

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[2]Respondents believe that petitioner is estopped from collaterally attacking the sale procedure. As the sole general partner of the Partnership, only the petitioner could have authorized the Partnership's agreement to the sale procedure specified in the Agreed Order and the Foreclosure Order.

App. 1, at A-7). Assuming, *arguendo*, that an injury resulted from the lower court decision, that injury was suffered by the Trust, not the petitioner.[3]

Furthermore, any relief granted by this Court will not redress the alleged injury that resulted from the sale of the Property by the court-appointed commissioner. Petitioner requests that this Court vacate the Foreclosure Order and remove the case to the Illinois Appellate Court with instructions to rehear the case. (Petition at 15). As previously discussed in Section I.A. above, reversing the lower court as to any finding on a federal issue will not affect the ultimate outcome of this case. The Illinois Appellate Court's decision was based upon the petitioner's failure to comply with state procedural requirements. (*See supra* pp. 6-8). Any reversal by this Court on a federal issue will not act to cure the petitioner's procedural deficiencies, and the ultimate result will be the same as the previous decision by the lower court.

This Court should deny the relief requested by petitioner because it will not result in redress of the alleged injury, but only generate additional costs for the respondents that must be applied against the sale proceeds of the Property.

E. The Decision Below Was Intrinsically Fact Specific and Narrowly Drawn.

In upholding the Circuit Court's denial of the petitioner's motion to vacate, the Illinois Appellate Court rejected petitioner's collateral attack upon the Foreclosure Order. The court, after extensively discussing the background of this case, focused upon the underlying facts to deny petitioner's appeal:

> Since the order was entered with petitioner's consent, the motion to vacate was not raised until 6 months after its entry, and peti-

---

[3]The mortgage on the Property was nonrecourse, and therefor, the individual partners were not liable for the shortfall suffered by respondent when it later sold the Property.

> tioner objected to confirmation of the sale on other grounds, we find that the trial court did not err in denying petitioner's petition. ...

(Petition, App. 1, at A-6).

This Court should again refuse to exercise its certiorari jurisdiction to consider the fact specific matters raised by petitioner. *See, e.g., Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting the denial of certiorari), *citing United States v. Johnston*, 268 U.S. 220, 227 (1924) ("We do not grant certiorari to review evidence or discuss specific facts."); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (writ of certiorari presenting primarily a question of fact dismissed as improvidently granted).

CONCLUSION

For the reasons stated herein, the Petition of Wayne P. Jackson for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: April 5, 1990

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT, FOURTH DIVISION

Trustee of Central States, Southeast and Southwest Areas Pension Fund	)	Appeal from the Circuit Court of Cook County Illinois, County Department, Chancery Division
Plaintiff-Appellee,	)	
vs.	)	No. 86 CH 73
LaSalle National Bank, as Trustee Under Trust Agreement dated 12/18/75 and known as Trust No. 21599, et al.,	)	
Defendants-Appellant.	)	The Honorable Judge Thomas O'Brien, presiding.

DEFENDANT-APPELLANT'S PETITION FOR REHEARING

Appellant Wayne Jackson, petitions this Appellate Court for a rehearing of its decision rendered on June 22, 1989, wherein the trial court's denial of Appellant's Amended Petition to Void the Judicial Sale was affirmed. The Petitioner

submits that this court misapprehended critical factual matters and misapplied Illinois law to the substance of his appeal.

At no time during the pendency of the mortgage foreclosure proceeding in the trial court, did the Petitioner/Appellant Wayne Jackson appear, participate, or consent to the entry of any agreed order or Judgment. The Petitioner did not participate in the trial court proceedings until he filed his Petition to Void a portion of the Judgment of Foreclosure regarding his attack on the trial court's lack of authority to conduct the judicial sale as designated within the terms of the judgment. At no time, did the Petitioner/Appellant consent to any order including an order confirming the Judicial sale referred to by this Appellate Court in the first paragraph of page 7 of its opinion.

An attack alleging that a judicial sale is void can be made based on the court's lack of subject matter jurisdiction which includes the trial court's transcending of its authority, if it is solely statutorily based. Petitioner contends that this Appellate Court misapprehended his argument when he asserted that the trial court lacked any statutory authority to appoint a commissioner for the purpose of conducting the sale. The provision of the Illinois Constitution specifically excludes the judiciary from considering as part of its inherent power any ability for appointing fee officers in the judicial system. The court, constitutionally prohibited from considering as part of its inherent power an authority to appoint fee officers, must search for legislative statutory authority to support the appointment. The only statutory authority for the conduct of a judicial sale for a foreclosure proceedings by a person other than the trial court Judge in Cook County, Illinois, is found in the Circuit Court Rules of Cook County authorizing the Sheriff of Cook County to conduct the sale.

Although the trial court Judge has subject matter jurisdiction to render a judgment in a mortgage foreclosure action, as presented by the case at bar, he transcended his subject matter jurisdiction when he made an appointment of a fee officer, a special commissioner, to conduct the judicial sale.

That portion of the judgment order in error is void and not voidable.

This court's reference to Illinois case law regarding the appointment of special commissioners is a misapplication of Illinois law to the instant case. In the cases cited within this court's opinion, each case refers to an appointment of a special commissioner during a period of time when Illinois courts were empowered to reference matters to either masters in chancery or to special commissioners. Referencing by the judiciary, is no longer available by Illinois statutory law nor by the Illinois Constitution. There is no provision within the Illinois Mortgage Foreclosure Act, the Judgment Act, nor the Illinois Code of Civil Procedure for referencing by the trial court Judge of a judicial sale to a commissioner. The trial court Judge lacked the power to decree that portion of its Judgment Order.

There are several Illinois decisions regarding the propriety of reference. In 1955, the Illinois Appellate Court held in Smallwood v. Soutter, 5 Ill. App. 2, 303 (1st Dist., 2nd Div., 1955) 309 that:

> "The law in this State is that there can properly be no reference to a special or other assistant to a court in a chancery proceeding except as authorized by statute. (citations omitted) There is no other procedure which defines the responsibilities of any other persons as assistants or officers of the court with the authority to administer oaths to witnesses, and otherwise perform the duties of a master or other statutory officer in matters of chancery reference. (citations omitted)
>
> The court's have no power to delegate any of their duties unless clearly authorized by law."

This Appellate Court applying the decision of Stark v. Stark, 7 Ill. App. 2, 442, used Illinois law during a time when referencing masters in chancery or special commissioners were not

prohibited. Illinois Courts of chancery no longer have the authority to reference matters as discussed in the Stark decision. In the Illinois decision of Mullaney, Wells, & Co. vs. Savage, 31 Ill. App. 3d, 343 (1st Dist., 5th Div., 1975) the referencing to a special commissioner was salvaged as a continuation of the court's original proper authority to appoint a master in chancery. This appointment was originally made in a case filed in 1963. Although the masters in chancery term expired and the law in Illinois changed after the filing of the case, the appointment was held proper as a matter of continuing jurisdiction of the court. This decision held that ". . . defects in subject matter jurisdiction may not be waived . . ., because the parties by their consent cannot confer upon a court a power which it does not possess." Mullaney, *supra*., 347.

Although the Appellate Court is correct in respect to the bankruptcy court's powers and authority, nowhere in 11 U.S.C.A. §105(a) (West Supp. 1989) can the bankruptcy court expand the powers of a state trial court for the appointment of a commissioner when the state constitution has the prohibitive language regarding the appointment of fee officers by the judiciary. The bankruptcy court in the case at bar could have properly supervised the judicial sale by causing the appropriate officer of the Sheriff of Cook County, Illinois, to conduct the sale in the presence of the bankruptcy court.

The Appellant has always contended that the judicial sale as ordered by the trial court was void. The Appellant further contends that he has complied with the requisite procedure to collaterally attack a judgment void in part. The Appellant never sought to have the order confirming the judicial sale vacated on any equitable grounds or on any other grounds other than on the basis that part of the judgment was void. The Appellant need not show diligence. An attack on a void judgment may be made by Section 2-1401 Petition (formerly known as Section 72 of the Illinois Civil Practice Act) without showing either due diligence or meritorious defense. LaMotte vs. Constantine, 92 Ill. App. 3d, 216 (1st Dist., 1st Div., 1980). A request to vacate a void order *may* be made at any time and a lapse of time is not a criteria for that deter-

mination. Klehm vs. M. Suson & Assoc. Inc., 22 Ill. App. 3d, 346 (1st Dist., 4th Div., 1974).

CONCLUSION

For all of the reasons stated above, this Court should rehear and reconsider its decision affirming the trial court Judge's Order denying Wayne Jackson's Amended Petition.

Respectfully submitted,

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IN THE
SUPREME COURT OF ILLINOIS

Trustee of Central States, Southeast and Southwest Areas Pension Fund Plaintiff-Respondent, vs. LaSalle National Bank, as Trustee Under Trust Agreement dated 12/18/75 and known as Trust No. 21599, et al., Defendants, and Wayne Jackson, Defendant-Petitioner.	Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 87-1339 _____ There Heard on Appeal from the Circuit Court of Cook County, Illinois. No: 86 CH 73 _____ Honorable Thomas O'Brien Judge Presiding

PETITION FOR LEAVE TO APPEAL

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Attorney for *Defendant-Petitioner*
WAYNE JACKSON

The defendant-petitioner, Wayne Jackson, respectfully petitions this Court for leave to appeal from the Judgment of the Appellate Court of Illinois, First District.

JUDGMENT BELOW

The Appellate Court entered its judgment in this case on June 22, 1989. Wayne Jackson, defendant-petitioner, filed a Petition for Rehearing on July 13, 1989. The Appellate Court denied the Petition for Rehearing on August 1, 1989.

POINTS RELIED UPON FOR REVERSAL

1. The State of Illinois Constitution of 1970 provides, in part, at Article VI, §14, that: "There shall be no fee officers in the judicial system." The petitioner collaterally attacked, as void, a portion of the trial court's judgment of foreclosure and sale which provided for the sale to be conducted by a commissioner appointed by the trial court. The Appellate Court did not void that portion of the judgment order, based on:

(a) A state court referencing a chancery matter to a special commissioner is, at most, voidable.

(b) The agreed bankruptcy order supervisionally reviewed by the Federal Bankruptcy Court validates the appointment of a commissioner, even if prohibited by the Illinois Constitution.

(c) A Federal Bankruptcy Court may order a state court to enter a judgment containing a Constitutionally prohibited appointment in order to enforce the provisions of the bankruptcy court.

(d) An agreed bankruptcy order supersedes applicable state law irrespective of the impropriety of a state court appointing a fee officer.

2. The Appellate Court failed to recognize an exception, recognized by the Illinois Supreme Court, to the general rule that a judgment entered by a court with subject matter jurisdiction cannot be collaterally attacked. The

exception provides that where a court exceed its jurisdiction and its judgment transcends the law and exceeds its jurisdictional limits the judgment or that portion of the judgment is void.

STATEMENT OF FACT

On January 3, 1986, a mortgage foreclosure action was filed by the respondents, Trustees of Central States Southeast and Southwest Areas Pension Fund (the "Fund"). Appellee Johnstown/Consolidated Realty Trust ("JCRT") counterclaimed seeking foreclosure of its third mortgage lien. Numerous parties including two land trusts (owners of the land and severed building) along with "Unknown Owners and Non-Record Claimants" were made Defendants.

A partnership with an interest in the subject property filed a Chapter 11 Bankruptcy proceeding on February 13, 1986. The automatic stay was modified by an Agreed Order entered on April 28, 1986, by several of the Defendants participating in the bankruptcy proceedings. An agreed order of foreclosure for entry by the trial court was made an exhibit to the agreed bankruptcy order.

On June 13, 1986, the trial court entered the agreed foreclosure decree. The agreed foreclosure decree provided for a commissioner to be appointed by the trial court to sell the subject property in Judge Eisen's bankruptcy courtroom on July 24, 1986. The counter-plaintiff JCRT was the successful bidder at $10.4 billion, subject to $3.5 million of unpaid real estate taxes and a second mortgage lien. The trial court confirmed the results of the sale on September 3, 1986.

The petitioner Wayne Jackson, an unnamed Defendant with an interest in the subject property and included within the designation of defendants "Unknown Owners," filed a petition to void the commissioner's sale on December 16, 1986, and an Amended Petition on January 15, 1987, asserting that this Court lacked authority to appoint the commissioner and that the sale was void. During the pendency of Jackson's Petition, JCRT sold the property on December 23, 1986, even though the record of this proceeding disclosed the void part of the judgment order appointing a commissioner to conduct the sale.

On March 31, 1987, the trial court denied Jackson's Amended Petition to void a portion of the agreed foreclosure decree.

ARGUMENT

A court has inherent powers to carry out its judicial purposes. Its inherent powers are limited by the prohibitions established within the Constitution conferring it its judicial powers.

The State of Illinois Constitution of 1970 provides a specific prohibition that: "There shall be no fee officers in the judicial system." Article VI, Sec. 14, of the Illinois Constitution of 1970, S.H.A. There have been no Illinois Supreme Court decisions regarding this prohibition of the judiciary. However, the Illinois Appellate Court, First Judicial District found this prohibition: ". . . aimed primarily at abolition of the office of master in chancery." Factor v. Factor, 27 Ill. App. 3d 594, 327 N.E. 2d 386 (First Dist., First Div., 1975). Justice Goldberg was unable to find any justification for a violation of this constitutional provision with its meaning clear and plain. He found a commissioner to be a fee officer within the judicial system in the Factor case, which was, however, a direct appeal.

The general rule of law provides for a collateral attack of a judgment only when the court lacked subject matter jurisdiction or jurisdiction over the person. Without these jurisdictional defects, no collateral attack can be made to void a judgment of the court no matter how erroneously entered. This Illinois Supreme Court has established an exception to this general rule of law which provides that a judgment or a portion of the judgment can be collaterally attacked and determined void, if the court has exceeded its authority and transcended the law or statute.

In a foreclosure action, this Court found it essential to a valid judgment that the Court possess the property jurisdiction to render the judgment. The Court's decree can be voided, even when the Court possessed subject matter jurisdiction, if the court exceeded its jurisdiction. Any sale resulting from the Court's transgression of the law results in the sale being an absolute nullity. Armstrong v. Obucino, 300 Ill. 140 (1921).

The Supreme Court's stated exception was reasserted in The People vs. Alfano, 386 Ill. 578 (1944) which found that any portion of the judgment in excess of the Court's jurisdiction is void, without effecting the valid portion of the judgment. A court lacking subject matter jurisdiction cannot by consent have that jurisdiction conferred to it and a judgment entered by a court lacking the jurisdiction or power to enter the judgment is void. Toman v. Park Castles Apr. Bldg. Corp., 375 Ill. 293.

The Appellate Court's opinion infers that the Federal Bankruptcy Court has the power to cause a state court to enter a judgment order which it would otherwise be prohibited by state constitution from entering. The various references by the Appellate court to 11 U.S.C.A. §105(a) (West Supp. 1989) and Article I, section 8 of the United States Constitution do not provide persuasive authority. A bankruptcy court no longer is empowered to appoint anyone but a designated trustee of the United States Trustee's Office for the purpose of conducting a sale in a bankruptcy proceedings. No citation is given wherein a bankruptcy court can instill a state court with power that is otherwise prohibited by its state's constitution. This apparent authority of the bankruptcy court could establish an unusual and unpredictable precedent if allowed to remain unchallenged.

CONCLUSION

The Appellate Court's opinion found the appointment of a commissioner by the Trial Court Judge to be at most a voidable appointment. The clarity of the relevant language of the Constitution requires no construction. It is further believed that referencing to either masters in chancery or to special commissioners is no longer the law of the jurisdiction. If, however, the Appellate Court's opinion is allowed to remain the law of this jurisdiction, future appointments of fee officers by the courts will not be totally prohibited, but merely treated as erroneous rulings of the courts. The clear purpose of the framers of the 1970 State of Illinois Constitution prohibiting fee officers will be substantially modified and diluted to merely

a voidable appointment rather than a void appointment. This Court should assure the clarity of this prohibition.

Respectfully submitted,

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